No. 2281

United States

Circuit Court of Appeals

For the Ninth Circuit.

POTLATCH LUMBER COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Rules of U.S. Circuit
Court of Appeals
825

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

CANNON, FERRIS & SWAN, Old National Bank Building, Spokane Washington,

Attorneys for Plaintiff in Error.

And

ROBINSON & MILLER, Hyde Block, Spokane, Washington, and

OSCAR CAIN, Federal Bldg., Spokane, Washington,

Attorneys for Defendant in Error. [1*]

In the Superior Court of the State of Washington, for the County of Spokane.

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action alleges:

I.

That at all the times hereinafter mentioned the defendant was a corporation, created, organized and existing under the laws of the State of Maine, and has

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*Page number appearing at foot of page of original certified Record.

complied with the laws of the State of Idaho, relative to foreign corporations doing business therein and owns and operates a lumber manufacturing plant at Potlatch in the State of Idaho, together with cars and appliances used in hauling, and loading logs at its mill and maintains offices and a place of business in the city of Spokane, Washington.

II.

That on the 20th day of January, A. D. 1910, the plaintiff commenced to work for defendant in its green shed and on the pond where logs were stored, and about four or five days prior to the 19th day of February, 1910, was placed at work assisting in unloading logs from cars into the pond, said logs being unloaded by means of cables placed under the logs on the cars and said cable being attached [2] to a crane operated by steam by the side of the car, which when raised on the side of the car next to the crane rolled the logs off of the car and into the pond.

III.

That on said date and a few minutes after 12 o'clock on the morning of said day, plaintiff, under the order and directions of the defendant and the employee in charge of unloading said logs, was assisting in unloading as aforesaid, and after an attempt had been made as aforesaid to unload logs from a car, three logs were left remaining on the car that the cable failed to unload into the pond, that the night was dark and the place was unlighted except from an electric light a long distance away, so that plaintiff was unable to see or know the position of the remaining logs upon the cars and was ordered

and directed by the employee in charge of said unloading to get upon the car with a peevy and roll the said logs from said car. That while plaintiff was attempting to roll said logs from said car, and not knowing of any danger in so doing and being unable, because of the darkness, to see the position of said logs, one thereof rolled upon the end of another which projected over the side of the car, causing the other end thereof to tip up with great force, striking the plaintiff and knocking him into and upon the logs in the pond, mashing, bruising and injuring the left knee, and breaking, bruising and injuring the left foot or instep, and severely lacerating the tendons of his left leg, and the right side of plaintiff's head was severely injured and bruised and his teeth on the right side were jarred loose, and his jaw was injured to such an extent that the nerves thereof have become deadened, and plaintiff's left leg and foot is and will continue to be weak, crooked, sore and crippled, and will continue to be during the [3] remainder of plaintiff's life, and has and will continue to cause him great pain and suffering, as will also plaintiff's teeth and jaw, and plaintiff's left shoulder and back were sprained and he suffered a severe shock to his nervous system, and plaintiff is and has been permanently disabled and incapacitated from following any occupation requiring the exercise of physical strength while upon his feet or lifting.

IV.

That plaintiff at the time of the happening of said accident was of the age of 17 years and inexperienced in this character of work, and entered the em-

ploy of the defendant with the understanding that he was to be engaged in a less hazardous occupation.

V.

That by reason of the negligence and carelessness of the defendant in causing the injuries aforesaid to the plaintiff and the pain and suffering he has endured and will continue to endure, and the loss of his ability to work and the permanency of said injuries, he has been damaged in the sum of $18,000.00.

VI.

That on the 2d day of October, 1911, by an order duly made and entered in the Superior Court of Spokane County, Washington, Catherine M. O'Connell was appointed the guardian ad litem to represent the plaintiff in this case.

Wherefore, plaintiff prays judgment against the defendant in the sum of Eighteen Thousand Dollars ($18,000.00), and for his costs and disbursements herein.

(Signed) ROBERSTON & MILLER,
Attorneys for Plaintiff. [4]

State of Washington,
County of Spokane,—ss.

Catherine M. O'Connell, being first duly sworn, on oath deposes and says that she is the duly appointed guardian ad litem of the plaintiff in the above-entitled cause; that she has read the foregoing complaint, knows the contents thereof and that the same is true as she verily believes.

(Signed) Mrs. CATHERINE O'CONNELL.

Subscribed and sworn to before me this 2d day of October, A. D. 1911.

(Signed) FRED MILLER,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Filed Oct. 2, 1911, at 10:00 o'clock A. M. Glenn B. Derbyshire, Clerk. R. S. Knox, Deputy.

[Endorsements]: Complaint—being part of transcript of record on removal from State court to Federal Court.

Filed in the U. S. District Court for the Eastern District of Washington. April 1, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy. [5]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Answer.

Defendant, for answer to the complaint of the plaintiff, alleges:

I.

Admits paragraph I of plaintiff's complaint to be true.

II.

Answering paragraph II, defendant admits that plaintiff entered the employ of the defendant on or about the 20th day of January, 1910, and that on the 19th day of February, 1910, he was engaged in unloading logs from cars into the pond, and, save as admitted, denies each and every allegation, matter and thing in said paragraph II contained.

III.

Answering paragraph III of said complaint, defendant denies each and every allegation, matter and thing therein stated, whether as therein alleged or otherwise, except that it admits that plaintiff was in some manner injured on that night, but it denies that it has any knowledge or information sufficient to form a belief as to the extent of his injuries. [6]

IV.

Answering paragraphs IV and V of said complaint, defendant denies that it has knowledge or information sufficient to form a belief as to any of the matters or things therein stated, and it denies said paragraphs and each of them.

V.

Answering paragraph VI of said complaint, defendant admits that the matters therein stated are true.

FOR A FIRST AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. Alleges that it is a corporation as stated in paragraph I of said complaint, and that it has paid

its last annual license fee due the State of Washington.

2. That at the time stated the injury to plaintiff, if he was injured, was due solely and alone by reason of his own contributory negligence and carelessness in failing to protect himself against the dangers of logs rolling upon him or striking him, though he had ample opportunity to so protect himself, and to get out of the way of rolling logs had he seen fit to do so.

FOR A SECOND AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant alleges:

That if plaintiff's injury was caused by the negligence of anyone except himself, it was caused by the negligence of his associate engaged with him in the work of assisting plaintiff in moving the log in such a manner as to cause the same to strike against the plaintiff or roll upon him.

FOR A THIRD AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant alleges:

That the plaintiff, at the time he entered upon the work in which he was engaged, understood and thoroughly appreciated any and all dangers connected therewith, and fully [7] appreciated the fact that the logs would roll and might injure him if he got in their path, and that in entering upon the work he assumed and took upon himself all dangers and risks incident to his employment, among which were the dangers and risks which he alleges caused the accident.

WHEREFORE, defendant prays that plaintiff

take nothing by this action and that the defendant have judgment for its costs and disbursements herein.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

E. J. Cannon, being first duly sworn, upon oath, deposes and says: That he is one of the attorneys for the Potlatch Lumber Company, a corporation, defendant in the above-entitled action; that he makes this affidavit for and on behalf of said corporation for the reason and upon the ground that none of the officers of said corporation are at present within the county of Spokane, State of Washington, wherein said action is pending; that he has read the foregoing answer, knows the contents thereof and that the same is true as he verily believes.

(Signed) E. J. CANNON.

Subscribed and sworn to before me this 4th day of April, 1912.

[Notarial Seal] G. M. FERRIS,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash. [8]

[Endorsements]: Due service of the within answer by receipt of a true copy thereof admitted this 5th day of April, 1912.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff.

Answer. Filed in the U. S. District Court for the Eastern District of Washington. April 5, 1913. W. H. Hare, Clerk. By S. M. Russell, Deputy. [9]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Reply.

Plaintiff replies to the Answer of the defendant herein as follows:

I.

Denies each and every allegation and all the allegations of new and affirmative matter in said answer contained.

WHEREFORE: Plaintiff prays judgment as in his complaint.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff. [10]

State of Washington,
County of Spokane,—ss.

Catherine M. O'Connell, being first duly sworn, on her oath deposes and says that she is the guardian at litem of J. J. O'Connell, plaintiff in the above-entitled cause, that she has read the foregoing Reply, knows the contents thereof, and that the same is true as she verily believes.

(Signed) CATHERINE M. O'CONNELL.

Subscribed and sworn to before me this 8 day of April, A. D. 1912.

(Signed) DORA BEACH,
Notary Public in and for the State of Washington,
Residing at Spokane. **[11]**

[Endorsements]: Due service of the within Reply received this 9th day of April, 1912.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Reply filed in the U. S. District Court for the Eastern District of Washington, April 20, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[12]**

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled case, find for the plaintiff, and assess the amount of his damages at the sum of Three Thousand Five Hundred ($3500.00) Dollars.

(Signed) W. T. ELLWANGER,
Foreman.

[Endorsements]: Verdict. Filed in the U. S. District Court for the Eastern District of Washington, September 20, 1913. W. H. Hare, Clerk. [13]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Judgment.

This cause coming regularly on for trial on the 20th day of September, A. D. 1912, the plaintiff appearing in person and by his attorneys, Robertson & Miller and Oscar Cain, and the defendant by Cannon, Ferris & Swan, its attorneys, a jury of twelve persons was duly and regularly impaneled and sworn to try said cause, and witnesses were sworn and examined upon behalf of plaintiff and defendant and after argument of counsel and instructions of the Court, the jury retired to consider of its verdict and returning into court on the said 20th day of September, A. D. 1913, found for the plaintiff and against the defendant and assessed the plaintiff's damages at the sum of Three Thousand Five Hundred Dollars ($3,500). Thereafter the defendant filed its petition for a new trial and motion

for judgment *non obstante veredicto,* and the same having been submitted upon brief, and having been taken under consideration by the Court, and the Court having filed an opinion herein overruling each of said motions, and the Court being fully advised in the premises:

WHEREFORE: It is CONSIDERED, ORDERED and ADJUDGED by the Court that the said petition for new trial and the said motion for judgment *non obstante* [14] *veredicto* be and the same each hereby are overruled. And the plaintiff, by his attorneys, having moved the Court for judgment upon the said verdict and the Court being fully advised in the premises, and it appearing to the Court that the plaintiff is entitled to judgment upon the verdict heretofore rendered herein by the jury on the 20th day of September, A. D. 1912;

WHEREFORE: It is CONSIDERED, ORDERED and ADJUDGED by the Court that the above-named plaintiff do have and recover of and from the defendant the sum of Three Thousand Five Hundred Dollars ($3,500), together with interest thereon at the legal rate from date hereof until paid, and for plaintiff's costs and disbursements taxed at ——— Dollars.

Done in open court this 9th day of April, A. D. 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Service hereof acknowledged this 8th day of April, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Judgment on the Verdict and Order Denying Motion for Judgment *non obstante veredicto* and Petition for New Trial. Filed in the U. S. District Court for the Eastern District of Washington, April 9, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. **[15]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Motion for Judgment Non Obstante Veredicto.

Comes now the above-named defendant and moves and prays the Court for an order granting to it judgment in its favor and against the plaintiff herein, notwithstanding the verdict rendered in favor of the plaintiff and against the defendant on a former day of the present term of this court, to wit, on the 20th day of September, 1912, because there is no substantial evidence to authorize or justify said verdict or a judgment thereon in behalf of plaintiff and against this defendant, for the reason that the testimony in said case fails to show that defendant was guilty of any negligence whatever in the premises which was in any way the proximate cause of plaintiff's injury; that the evidence introduced on the trial of said

cause shows that the dangers and risks incident to doing the work in which the plaintiff was engaged at the time of the accident were open and obvious and of such a character that plaintiff assumed the same as a matter of law; that the evidence introduced upon the trial of said cause shows that plaintiff was guilty of contributory negligence as a matter of law in attempting to remove the logs from the car without ascertaining whether or not the same could be removed without striking or causing other logs on the car to fall and injure the plaintiff; that the [16] evidence introduced upon the trial of said cause shows conclusively that if plaintiff's injury was caused by and through the negligence of anyone other than himself, it was caused by and through the negligence of his fellow servant, Roy Rudd, for whose negligence the defendant is in no way responsible; that the evidence shows conclusively that plaintiff was at all times fully aware of the conditions of the lighting system furnished by the defendant and continued in the employment with full knowledge of said conditions, and that, therefore, he assumed any and all risks incident to working under those conditions the same being open and apparent; that upon the whole of the testimony introduced in said cause the defendant is entitled to the entry of judgment in its favor.

This motion is made and based upon the records and files in said cause, the minutes of the Court and the stenographic report of the evidence upon the trial of said cause.

In the event this motion is denied, and not other-

wise, then the defendant prays the Court to hear and consider its petition for new trial served and filed herein.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsements]: Motion for Judgment *Non Obstante Veredicto.* Filed in the U. S. District Court for the Eastern District of Washington, September 23, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

Due service of the within motion by receipt of a true copy thereof admitted this —— day of September, 1912.

_____,
Attorneys for Plaintiff. [17]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Petition for New Trial.

Comes now the above-named defendant and moves the Court to set aside the verdict of the jury rendered herein against it on the 20th day of September, 1912, and the judgment of the Court based

thereon and grant to it a new trial of said cause for the following reasons, to wit:

I.

Because of insufficiency of the evidence to justify said verdict. Defendant alleges the evidence to be insufficient:

(a) There is no substantial evidence to authorize or justify said verdict or judgment thereon in favor of plaintiff and against this defendant in that said evidence fails to show that defendant was guilty of any negligence whatever.

(b) That the evidence introduced in said cause shows conclusively that any and all risks in connection with doing the work in question were open and obvious and that plaintiff with full knowledge of the same assumed said risks and dangers as a matter of law.

(c) That the evidence introduced upon the trial of said cause shows that plaintiff was guilty of contributory negligence as a matter of law in attempting to remove said log from said car in the manner testified to by plaintiff. [18]

(d) That the evidence introduced upon the trial of said cause shows conclusively that if plaintiff's injury was caused by and through the negligence of anyone other than himself, it was caused and brought about by the negligence of his fellow-servant, Roy Rudd.

(e) That upon the whole of the evidence introduced in said cause, defendant is entitled to the entry of final judgment in its favor.

II.

Errors in law occurring at the trial as follows:

(a) The Court erred in denying defendant's motion for a directed verdict made at the close of all the testimony in said cause, for the reason and upon the ground that the plaintiff failed to show that the defendant was guilty of any negligence whatever, which was in any way the proximate cause of his injury, and for the reason that it appeared conclusively from the testimony introduced upon the trial of said cause that any and all risks incident to doing the work in question were open and obvious and readily understood and appreciated by a person of plaintiff's age and capacity, and that with full knowledge of said risks and dangers, plaintiff continued in the service of defendant and thereby assumed the said risks as a matter of law; that upon the testimony introduced in said cause, it appears that plaintiff was guilty of contributory negligence as a matter of law in attempting to remove said log from said car without ascertaining whether or not the same could be removed without causing the other logs upon the car to strike and injure him; that upon the evidence introduced in said cause it appears that if plaintiff was injured by and through the negligence of anyone other than himself, his injury was caused and brought about by and through the negligence of his fellow-servant, Roy Rudd, for whose negligence defendant is not in any way responsible; that it appears from [19] the testimony in said cause that if the defendant was in any way negligent with respect to its lighting system at the point of the ac-

cident; that plaintiff had full knowledge of the fact and assumed the risks incident to that negligence on the part of defendant, if any; that it appears from the testimony in said cause that the work in which plaintiff was engaged was of such a simple character that no instruction or warnings were necessary in order that plaintiff fully understand and comprehend any risks there might be in connection with doing such work.

(b) Error of the Court in refusing to give the following instruction requested by defendant:

> "The Court instructs you to return a verdict in favor of the defendant."

For the reason and upon the grounds stated under subdivision (a) herein.

(c) The Court erred in refusing to give the following instruction requested by defendant:

> "The Court instructs you that a servant upon entering the service of a master assumes the risk of the master's negligence, if any, by continuing in the employment without complaint where that negligence and the risk arising therefrom is obvious or plainly observable and the danger of which is appreciated by him or is clearly apparent."

for the reasons and upon the grounds stated under subdivision (a) herein.

(d) The Court erred in permitting the plaintiff to testify, over the objection of defendant, that the defendant had failed and neglected to warn or instruct him with reference to his duties and the dangers incident thereto for the reason, and upon the ground

that said testimony was not admissible under the allegations of negligence charged in plaintiff's complaint.

(e) The Court erred in permitting the plaintiff to [20] examine the witness, Joe Loehr, with reference to the warnings and instructions given to the plaintiff, for the reason and upon the ground that said testimony was not admissible under the charge of negligence set forth in plaintiff's complaint herein.

(f) The Court erred in permitting plaintiff to prove the failure of defendant to warn or instruct him with reference to the dangers incident to doing the work without requiring the plaintiff to amend his complaint and set forth an allegation containing said alleged negligence on behalf of the defendant.

III.

Accident and surprise which ordinary prudence could not have guarded against.

IV.

Misconduct of the jury.

V.

Excessive damages appearing to have been given under the influence of passion and prejudice.

VI.

Newly discovered evidence material to the defendant which it could not with reasonable diligence have discovered and produced at the trial.

This motion is made and based upon the pleadings, records and minutes of the court, the stenographic report of the evidence, and the documentary evidence on file herein, and the entire records and files in said cause, as well as the rules of this Court and the stat-

utes of the United States relating to new trial.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. [21]

I hereby certify that the within petition for new trial was by the defendant on this day presented to me for my certificate allowing the same to be filed, and I hereby certify that I allowed the same to be filed.

Dated this 23d day of September, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Due service of the within Petition by receipt of a true copy thereof admitted this 6 day of September, 1912.

_____,
Attorneys for Plaintiff.

Petition for New Trial. Filed in the U. S. District Court for the Eastern District of Washington. September 23, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [22]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Opinion.

ROBERTSON & MILLER and OSCAR CAIN, for Plaintiff.

CANNON, FERRIS & SWAN, for Defendant.

RUDKIN, District Judge.—The Court is by no means satisfied with the correctness of its ruling at the trial, admitting testimony tending to show that the defendant failed to warn the plaintiff of the dangers incident to the particular employment in which he was engaged, at the time of receiving the injuries complained of. If a right of action exists in this case at all, it arises out of the fact that the plaintiff was inexperienced; that the defendant had knowledge of his inexperience, or should have had such knowledge by the exercise of reasonable diligence on its part, and that with such knowledge or means of knowledge it placed the plaintiff at work in a dangerous place without warning him against the dangers which beset him. To present such [23] an issue it must be conceded that the complaint is very loosely and very inartificially drawn. The sole allegation of negligence is contained in its fourth paragraph, which reads as follows:

> "That plaintiff at the time of the happening of said accident was of the age of 17 years and inexperienced in this character of work and entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation."

True, it is alleged in the third paragraph that the night was dark and the place unlighted, except by

one electric light a long distance away; and in the fifth paragraph, that by reason of the negligence and carelessness of the defendant in causing the injuries to the plaintiff he was damaged, etc., but I apprehend the former allegation was inserted simply for the purpose of describing the conditions surrounding the plaintiff at the time of the injury, and the latter is a mere legal conclusion from the other facts set forth in the complaint. If it be urged at this time that the want of light was an independent ground of negligence I presume it will be conceded that the absence of light, at least, was open and apparent, even to an inexperienced youth of seventeen years. By a liberal and forced construction it might be inferred from the averment in the fourth paragraph "that the plaintiff entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation," that the defendant had knowledge of his inexperience, but a failure to warn cannot be spelled out of the complaint by the most latitudinarian rule of construction. However, the foreman in charge [24] of the work was a witness at the trial, and at no stage of the case was there any intimation that a warning had been in fact given. Indeed, the third affirmative defense, "that the plaintiff at the time he entered upon the work in which he was engaged, understood and fully appreciated any and all dangers connected therewith and fully appreciated the fact that the logs would roll and might injure him if he got in their path, and that in entering upon the work he assumed and took upon himself all dangers and risks incident to his employ-

ment, among which were the dangers and risks which he alleges caused the accident," would seem inconsistent with the theory that a warning was given. Under all the circumstances, therefore, I am not prepared to say that the defendant was prejudiced by the ruling complained of.

Nor am I entirely satisfied that the plaintiff did not assume the risk. While the work in which he was engaged was dangerous it was by no means complicated. It was the duty of the plaintiff and a fellow-workman to remove from the cars such loose logs as might be left after the great body of logs had been removed by means of a crane. In the instance in question, three logs remained on the car, scattered about in an irregular and disorderly way. The end of one of these logs extended out beyond the body of the car. The plaintiff threw another log out onto this unsupported end and naturally, if not inevitably, the other end swung around and precipitated him off the car and into the water. It might seem that he should have appreciated this. The laws of gravitation are amongst our earliest conceptions. We can see their effect if we cannot see the force that attracts [25] atom to atom. It seems he should have known that if he threw a log onto the end of the log hanging out over the side of the car that the other end of the log was a dangerous place to remain. Many of the authorities cited by the defendant would seem to support this view of the case, but a jury of twelve men has found to the contrary, and I am not prepared to say that I am so far satisfied that their conclusion is erroneous as to justify me in directing

a judgment for the defendant. The motion for a new trial and the motion for a judgment, notwithstanding the verdict are therefore denied.

[Endorsements]: Opinion. Filed April 7th, 1913. W. H. Hare, Clerk. [26]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Order Extending Time to File Bill of Exceptions, etc.

Upon motion of defendant and good cause being shown therefor,

IT IS HEREBY ORDERED, that said defendant be and it is hereby granted sixty days after date within which to prepare, serve and file its proposed bill of exceptions in the above-entitled cause.

IT IS FURTHER ORDERED, that a stay of execution be, and the same is hereby granted to said defendant upon the verdict and judgment rendered herein upon the 20th day of September, 1912, for said period of sixty days.

Done in open court, this 23d day of Sept., 1912.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions 60 Days from Sept. 23, 1912.

Filed in the U. S. District Court for the Eastern District of Washington. September 23, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [27]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order [Extending Time to Prepare, etc., Bill of Exceptions, January 4, 1913, etc.].

On motion of defendant and good cause being shown therefor,

IT IS HEREBY ORDERED that defendant's time for preparing, serving and filing its proposed bill of exceptions herein, be, and the same is hereby extended until the 4th day of January, 1913; and

IT IS FURTHER ORDERED that a stay of execution be, and the same is hereby granted to said defendant upon the verdict and the judgment entered thereon in this cause upon the 20th day of September, 1912, until the 4th day of January, 1913.

Done in open court this 31st day of October, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions until Jan. 4, 1913. Filed in the U. S. District Court for the Eastern District of Washington, October 3, 1912. W. H. Hare, Clerk. [28]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order [Extending Time to Prepare, etc., Bill of Exceptions to February 10, 1913, etc.].

On motion of defendant and good cause being shown therefor,

IT IS HEREBY ORDERED that defendant's time for preparing, serving and filing its proposed bill of exceptions herein be, and the same is hereby extended until the 10th day of May, 1913, and

IT IS FURTHER ORDERED that a stay of execution be, and the same is hereby granted to said defendant upon the verdict and the judgment entered thereon in this cause upon the 20th day of September, 1912, until the 10th day of February, 1913.

Done in open court this 30th day of December, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions until February 10, 1913. Filed in the U. S. District Court for the Eastern District of Washington, December 30th, 1912. W. H. Hare, Clerk. Frank C. Nash, Deputy. **[29]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order [Extending Time to Prepare, etc., Bill of Exceptions to May 10, 1913, etc.].

On motion of defendant and good cause being shown therefor,

IT IS HEREBY ORDERED that defendant's time for preparing, serving and filing its proposed bill of exceptions herein be, and the same is hereby extended until the 10th day of May, 1913, and

IT IS FURTHER ORDERED that a stay of execution be, and the same is hereby granted to said defendant upon the verdict and the judgment en-

tered thereon in this cause upon the 20th day of September, 1912, until the 10th day of May, 1913.

Done in open court this 5th day of April, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions until May 10th, 1913. Filed in the U. S. District Court for the Eastern District of Washington, April 5, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. **[30]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order [Staying Execution upon Verdict to May 10, 1913, etc.].

Upon motion of defendant, it is hereby ordered that a stay of execution be granted upon the verdict and judgment rendered in the above-entitled cause up to and including the 10th day of May, 1913, in order to allow defendant time within which to perfect a writ of error in this case to the Circuit Court of Appeals for the Ninth Judicial Circuit.

Done in open court this 10th day of April, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Staying Execution upon Verdict and Judgment until May 10, 1913. Filed in the U. S. District Court for the Eastern District of Washington, April 10th, 1913. W. H. Hare, Clerk. [31]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order [Extending Time to Prepare, etc., Bill of Exceptions to June 10, 1913, etc.].

Upon motion of defendant, and good cause being shown therefor,

IT IS HEREBY ORDERED, that said defendant be, and it is hereby granted an additional extension of thirty (30) days from and after the 10th day of May, 1913, within which to prepare, serve and file its bill of exceptions in the above-entitled cause, and,

IT IS FURTHER ORDERED that a stay of execution be granted to said defendant upon the verdict and judgment rendered in said cause during said time.

Done in open court this 8th day of May, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions Thirty Days After May 10th, 1913.

Filed in the U. S. District Court for the Eastern District of Washington, May 8, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. **[32]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Notice of Filing Defendant's Proposed Bill of Exceptions.

To the Above-named Plaintiff, and to Messrs. Robertson & Miller, Your Attorneys:

You and each of you are hereby notified that on the 28th day of May, 1913, the above-named defendant filed in the office of the clerk of the above-entitled court, its proposed Bill of Exceptions of said cause, for use upon writ of error of said cause to the Circuit Court of Appeals, a copy of which proposed bill of exceptions is herewith served upon you.

CANNON, FERRIS & SWAN,
Attorneys for Defendant. **[33]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 1319.

Before: Hon. F. H. RUDKIN, Presiding Judge.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

APPEARANCES:

For the Plaintiff:
Messrs. ROBERTSON & MILLER; Messrs. CAIN & MACDONALD.

For the Defendant: Messrs. CANNON, FERRIS & SWAN.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial in the above-entitled court, on Friday, September 20, 1912, before Honorable Frank H. Rudkin, Presiding Judge, the plaintiff being represented by his counsel, Messrs. Robertson & Miller and Messrs. Cain & Macdonald, and the defendant being represented by its counsel, Messrs. Cannon, Ferris & Swan.

WHEREUPON the following proceedings were had:

A jury of twelve men was duly empaneled and sworn to try the case. [34*—2†]

Mr. FERRIS.—If the Court pleases, in the case now on trial, the O'Connell case, the defendant desires to make an application for a continuance upon the ground of the absence of one of the witnesses. It seems that at the time of the accident there was only one witness present with plaintiff, a witness by the name of Roy Rud. He was employed by the defendant almost continuously since the accident and has at all time agreed to come whenever the case was set for trial, and we had every reason to believe that he would do that. It seems, however, that very recently he got into some difficulty up in the lumber camps where he was working, and since that time has been going under an assumed name. I understood from Mr. Cain that the plaintiff was also trying to locate this man. He was the only other witness who was present at the time. We have finally located his present whereabouts and find that he is either in Pendleton or near there, and have word from a man, I think, by the name of Albright, who is a very close friend of his, who is working for the Imperial Company. He knows where his present whereabouts are, and the defendant cannot go to trial at this time without the presence of this witness, and if he were present he would testify that he was employed with the plaintiff in the same kind of work and had been for some days or nights prior

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

to the accident; that the work [35—3] consisted in unloading these logs from the cars and on the night of the accident all the lights which had been furnished by the defendant were burning and in good order, and that in unloading one log from the car when there were some two or three others left on the car, this log in some way hit some other log and swung around and knocked the plaintiff off the car. It seems to me that under that state of facts the defendant should not be compelled to go to trial without this witness. We do not ask that the case go over the term, but feel that we can surely have this witness here inside of a week, and all we ask is that your Honor reset the case for sometime during the present term, allowing us about one week's time in which to get this witness. I am willing, if the other side insists, to file in the shape of an affidavit a statement of the facts that this young man will swear, which I have already in the form of a statement from him, signed by him, although not sworn to.

Mr. ROBERTSON.—I did not get that statement. I was not paying attention because I did not think it had any relation to this case at all. I would like to hear it, what this witness will testify to.

Mr. FERRIS.—He will state that he was employed with the plaintiff doing the same kind of work, and had been for several days or nights previous to the [36—4] accident; that the work consisted of unloading logs from cars; that on the night of the accident they were proceeding to do the work in the same manner that they had been for the several

nights previous, and that at the time of the accident there were some three logs on the car and that he attempted to push one of these off, and that in some way it swung around and hit one of the other logs, and that when he saw this he called to the plaintiff, but the log swung around and struck the other log and pushed the plaintiff off the car. He will testify that the lights were in the condition that they had been for several nights previous to the time they were working there; that it was not necessary for any foreman to be present, and there was not any present at the time of the accident, and that he and the plaintiff fully understood all of their duties in connection with the unloading of the logs.

Mr. ROBERTSON.—In order to save a continuance in this case and in view of the statement of counsel, we will be forced to admit that if that witness was here he would so testify. Of course, the weight and credibility of that admission is a matter —by admitting that I do not understand that we admit the truth of it, but that the witness will so testify.

Mr. FERRIS.—If they will admit that he will so testify, that is all we care for. [37—5]

The COURT.—In order that there may be no misunderstanding as to what the admission amounts to, the application should be reduced to writing, I presume.

Mr. FERRIS.—I have a statement of what the witness claims the facts to be that I will reduce to the form of an affidavit and file.

Mr. ROBERTSON.—I think the statement we have admitted as made, the stenographer can write it

(Testimony of John Joseph O'Connell.)

out and that will be satisfactory to us.

Mr. FERRIS.—Very well, that is entirely satisfactory.

The COURT.—Very well, proceed. [38—6]

Mr. Robertson thereupon made an opening statement to the Court and jury.

Thereupon the following evidence was introduced in behalf of the plaintiff:

[Testimony of John Joseph O'Connell, in His Own Behalf.]

JOHN JOSEPH O'CONNELL, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Mr. O'Connell, please state your name in full to the jury, and sit up and look at these gentlemen over there, please. A. John Joseph O'Connell.

Q. State to the jury whether or not you were in the employ of the defendant, the Potlatch Lumber Company, at the time you complain of having received the injuries that you sue to recover for. A. I was.

Q. How had you been working for them?

A. In Potlatch I had been working somewhere in the neighborhood of a month.

Q. How old were you at that time?

A. 17 years old.

Q. Where were you born, Mr. O'Connell? [39—7]

A. In Helena, Montana.

Q. And where did you pass your life, as near as you can recall—where was your first experience in

(Testimony of John Joseph O'Connell.)

life, the first years of your life passed?

A. The first I can remember anything now about was in Wallace, Idaho.

Q. And how long did you live in Wallace?

A. One year.

Q. Then where did you go?

A. To Lothrop, Montana.

Q. And how long did you live there?

A. Five years.

Q. How old were you in Lothrop when you lived there? A. Thirteen.

Q. What? A. I was twelve years old.

Q. And then where did you go to?

A. To Helena, Montana.

Q. And how long did you stay there?

A. Four months.

Q. Then where did you go? A. Missoula.

Q. How long did you stay there?

A. Something like nine months, I think.

Q. Then where did you go? [40—8]

A. To Logan, Montana.

Q. And how long did you stay there?

A. One year.

Q. And then where did you go?

A. To Harvard, Idaho.

Q. How long did you stay there?

A. Two years.

Q. Then where did you go?

A. I was around Harvard up to the time I went to Potlatch.

Q. I ask that for the purpose of showing the differ-

(Testimony of John Joseph O'Connell.)

ent places, and tell the jury what business your father was in.

A. My father was in the railroad business.

Q. What doing? A. Trackman.

Q. He is still in that business? A. Yes, sir.

Mr. FERRIS.—I object to that as immaterial. I do not see what bearing it has.

The COURT.—He has answered the question.

Mr. FERRIS.—I ask to have it stricken.

Mr. ROBERTSON.—The purpose is simply to show his opportunity and experience.

Mr. FERRIS.—Well, we have no objection; he has answered it. [41—9]

Mr. ROBERTSON.—Q. Please state to the jury, now, how old you were when you went to work.

A. I do not understand.

Q. How old were you when you began to do work?

A. I was a little over 14.

Q. Just tell the jury now as briefly as you can the character of the work you have done from the time you went to work up to the time you were injured.

A. I worked on section work first from June until October, and I did not do anything until February, and I helped my father making ties, and I went to work on the section in May of that year, the next year, and worked until October. Then I worked two months in a store as a clerk, and the next summer I worked on a ranch doing odd jobs, and during the winter before I was hurt I put up ice, that is, before I went to Potlatch.

Q. Just tell the jury what and how you were em-

(Testimony of John Joseph O'Connell.)

ployed to go to Potlatch, who employed you, and what, if anything, was said, about the character of the work you were to do for them.

A. At the time I went to Potlatch I went first to work in the green shed, piling lumber, or taking lumber off of the chain, and I worked there about a week and a half or two weeks, and I laid around some days, and I went to the pond foreman, Joe Lair, I think his name is. I would not say for sure. [42—10]

Q. Just explain that pond to the jury.

A. What is that?

Q. Did you say you went to the pond?

A. Yes, sir, I went to the pond.

Q. Just explain that pond to the jury, how big it is and what it is used for.

A. A hot pond where they kept logs; they have a sort of a raft there, they have two chutes on it, and they get logs there and send them up the chain into the mill. He hired me to work on the boat as a measurer, measuring logs.

Q. Do they saw the logs off? A. Yes, sir.

Q. Do the logs come in different lengths from the woods? A. Yes, sir; there is some long logs.

Q. What did you do in reference to sawing them?

A. They have blocks they drop down in the water and run a log up against it and hold it there until the man would get his dog on it to hold it while he sawed it.

Q. How long had you been working at that work before the night you were hurt, how many days?

(Testimony of John Joseph O'Connell.)

A. I worked two or three nights there, and two or three nights on the boom.

Q. Did you have any conversation at all with anybody at the time you went to work as to the character of the [43—11] work you were to do?

Mr. FERRIS.—That is objected to on the ground it is immaterial.

Mr. ROBERTSON.—I will show it is material, I think, afterwards.

Mr. FERRIS.—The counsel's opening statement to the effect he was not warned in any way of the dangers, if that is what he is leading up to, is not one of the grounds of negligence pleaded in the complaint, as I read it, and it does not seem to me that this answer can be in any way material.

Mr. CAIN.—It is alleged in the complaint that he was hired to perform a different class of work.

The COURT.—You may answer the question.

(Question read.)

A. I was hired to work on the boat as a measurer, measuring logs.

Mr. ROBERTSON.—Q. Just tell the jury, now, what was said at the time of the hiring by the man who hired you, and tell them who hired you.

A. When I asked him for a job, I asked him for a job working on the boat, and, if I remember right, the first night he said he had nothing except back on the logs. I told him I could not do that, as I had no experience, and the next night, I think it was, he had one man short on the boat or on the boom—on the boat, [44—12] and he put me there measuring,

(Testimony of John Joseph O'Connell.)

and he said that he would be there and I worked there two nights, I think, if I remember right, and then he put me on the boom—that is down further, shoving logs to the chute.

Q. Now, state to the jury whether or not at the time you were shoving the logs in the boom they had been unloaded from the cars.

A. They were unloaded before that.

Q. When you were shoving them into the boom, state to the jury whether or not they were to be moved any distance through the air to any lower place.

Mr. FERRIS.—I object to that on the ground that it is leading. I think the witness should describe the operations there.

Mr. ROBERTSON.—I am willing to do that; I only sought to bring that to his attention. Read the question. (Question read.)

A. No, they were not.

Q. Where were they laid?

A. They were in the water.

Q. Now, when was the first time you went upon any flat cars or any logging cars to move logs from the surface of them?

A. Two nights before I was hurt, I think, is the first time.

Q. And how long had you worked there then? [45—13]

A. How is that?

Q. How long had you worked the first night?

A. I worked ten hours and a half the first night.

(Testimony of John Joseph O'Connell.)

Q. And the second night?

A. That is, unloading logs?

Q. Yes, sir; I mean unloading logs, how long had you worked at the unloading of logs?

A. Unloading logs, it did not take over an hour and a half to two hours.

Q. And then the next night?

A. About the same time.

Q. And then the night that you were injured, what time did you go to work?

A. I went to work at seven o'clock, I think, if I remember right.

Q. State to the jury what you were doing after you went to work.

A. Up until about 10:30 I was piking logs along through the pond and putting in booms to pull them down, and about 10:30 or a quarter to eleven, I think it was, we started to unload the train.

Q. Tell the jury how you came to start there and what was done.

A. The foreman—when the train pulled in the foreman told me and another man by the name of Roy Rud to pull the logs on the docks, that is, the docks have a trip on them, [46—14] and then when we done that the train came up there.

Q. How many logs would there be on a car?

A. I have no idea how many; it would depend on the size of them.

Q. How? A. It would depend on the size.

Q. That particular night how many log cars came in with that train? A. 27 cars.

(Testimony of John Joseph O'Connell.)

Q. Tell the jury how the logs were unloaded generally.

A. They were unloaded with a steam crane that they had a swing body, and there is two cables on the car. If it was a car of short logs we would first hook on one cable on one end and dump that in, and then the other. If it was a car of long logs, we would hook both cables that were on the car at that time and dump them off.

Q. How would you get the logs to the crane—was the crane stationary or did it move up and down the track?

A. It moved; passed up and down the track.

Q. The crane did? A. Yes, sir.

Q. On what kind of a moving platform—what track was it on?

A. There was a double track there. **[47—15]**

Q. Was the crane on the car?

A. No, sir; it was on a body of its own.

Q. With wheels? A. Yes, sir.

Q. Like a car? A. Yes, sir.

Q. State to the jury when that train performed its services if ordinarily the logs were all moved off of the flat-cars or not by the crane.

A. They were not. There was times there would be three and four logs stay on a car. Long logs hardly ever stayed on as the cables would throw them all off, but the short logs, they turned all ways.

Q. I will ask you to state to the jury in your own way, Mr. O'Connell, just go on and tell in your own way; first tell them what kind of a night it was.

(Testimony of John Joseph O'Connell.)

A. It was a dark, misty night, cold—I should think about five or six below zero.

Q. And how long had you been working in that weather there? A. How is that?

Q. How long had you been working out there in the open—since you went to work or not?

A. From the time I went to work.

Q. I will ask you to state what was the condition of light at the place where the log was that injured [48—16] you. A. It was very poor.

Q. Well, just tell the jury whether or not it cast sufficient light to furnish you light so you could see to do the work there.

Mr. FERRIS.—We object as calling for a conclusion of the witness. He might describe it, describe how large it was or how light it was.

A. Well, the light must have been off 150 or 200 feet, and the steam from the pond makes a fog around there and the lights were not very good.

Mr. FERRIS.—I did not hear that last.

A. The lights were not very good.

Mr. FERRIS.—I object to the latter part of that as a pure conclusion of the witness. I think that is a question for the jury.

The COURT.—I think it would be hard to describe. I will allow it to stand.

Mr. ROBERTSON.—Q. About the degree of light or darkness at the pond where the logs were, tell the jury so they can understand. Tell the jury so they can understand the amount of light that this electric light threw over to those logs that night at

(Testimony of John Joseph O'Connell.)

the time you were injured.

A. It was not very much light; there was not hardly any light to speak of. [49—17]

Q. And the night, overhead, what was its condition as to being starry or moonlight or what?

A. Well, it was a dark night.

Q. Now, then, tell the jury how you came to move the logs in question.

A. We had passed by there—the foreman came back with us to the side of the car and told us to get up on the car and roll them logs off. We got up there and I stepped on the inside, the other man at the end of the log, and we were trying to get them off.

Q. Sir?

A. We began to get them off. There was small logs on the car pretty near level with the bunks, it was awful slippery and it took us sometime to get the first log started, and when it started we started to move back, and when I started to move the other log hit me across the back and knocking me on my head in the pond.

Q. How did the log that struck you, how did that happen to be moved?

A. By the end of the other log.

Q. Have you got a model here that you could in any way explain this to the jury there and to the Court so that they could understand it better than by you telling them? A. I think I could.

Q. I now hand witness a flat board with six skids [50—18] upon it for the purpose of further testify-

(Testimony of John Joseph O'Connell.)

ing at this time and illustrating the testimony. Now, I wish you would go on in your own way and illustrate what you mean. Just illustrate the whole matter anyway you want to.

A. (Illustrating.) It has the same purchase on there as it has on the other place (indicating), and in the crane drawing this here, it leaves this here straight up; it throws the logs around in all shapes, and the night that I was hurt this cable being on the other end here, it would throw the logs—in other words, this being filled in with snow and this log, if I remember right, was about 16 or 18 feet, and it was held something like that there and caught there, and we tried it and it caught down there on us again, in here, and when it went off it caught the end of that log, and the weight of it being not sufficient to throw that log up and around off the car, this log striking me, I was standing in here, right inside of this bunk, knocking me in the pond on my head.

Q. Now, could you show that night where the cable—if that is not the right place for the cable, you fix it at the right place. Does this plank represent an entire flat-car? A. Yes, sir.

Q. That is, there are six skids on the flat car?

A. Yes, sir, there is six. **[51—19]**

Q. Now, then, just show the jury now how the entire car would be loaded.

A. Well, it would be loaded something like that (illustrating), but loaded up high here; on this side of the car there is a trip pocket that is worked by a lever along the side, you trip it and a stake drops

(Testimony of John Joseph O'Connell.)

out on each side, on this one and this one.

Q. Were they iron stakes?

A. No, they were wooden stakes with a chain on them, and on this end there is a slide pocket, right there. Then there is a binding put on part way up the load with a hook, on this side, and when the crane comes along and pulls up there on this cable it pulls strong enough that you can knock this hook off and then he will pull this load off.

Q. Ordinarily, when there are long logs, how many of those cables operate on a single pile of logs?

Mr. FERRIS.—That is objected to on the ground it is not material; there is no claim that we did not have the proper cables or anything of that kind, as I understand it.

The COURT.—I see nothing in the complaint charging any defect of the appliances.

Mr. ROBERTSON.—Q. Now, state to the jury why the logs were moved—if the logs were moved or being moved by you and the other young man the same way that they [52—20] would have been unloaded if the cable had worked, that is, from the same side of the car?

Mr. FERRIS.—That is objected to on the ground that it has not any bearing here at all on the issues that I can see. They are really getting at the position that it was negligence in us not to furnish a cable that would take all of these logs off of this car so it would not be necessary for him to take them off.

The COURT.—Yes, there is no charge of any-

(Testimony of John Joseph O'Connell.)

thing of that kind in the complaint, as I read it.

Mr. ROBERTSON.—The charge is that those had been left there by the crane. Now, I think your Honor would hold, whether that crane was good or bad, if they were left there at the time the boy went there it would make no difference. Our contention is that when he was sent there to this particular place under the conditions that the foreman knew about, then whether or not the cable was good or bad would make no difference, the question would be what was the hazard in this particular work and whether or not the place was such a place under the conditions that he had been set to work there—it is not necessary for me to explain my purpose, unless your Honor desires it. The boy has just testified that there were fixed pockets on this side and there were pockets that fell down on the other side (indicating). I was asking him whether or not the logs were moved the same [53—21] way that they would have been unloaded if the cable had worked, to explain what would be the difference.

The COURT.—He has already explained that, but you may proceed.

Mr. ROBERTSON.—Q. Go ahead. I will ask you if you were going to roll the logs off on the same side they had been dumped as if the cable had dumped them off? A. Yes, sir, we were.

Q. Just explain that to the jury.

A. The pond is on this side, on that side of the car, and when the crane pulls up here they go right over into the pond.

(Testimony of John Joseph O'Connell.)

The COURT.—It seems to me this is pretty largely a repetition.

Mr. ROBERTSON.—The only question is, I think, the boy showed the moving of the logs off on this side.

The COURT.—No, he showed it on the other side.

Mr. ROBERTSON.—Well, if that is understood by the jury. State whether or not at the time you rolled and was working on these logs the light was so that you could see exactly how they laid one with relation to the other. A. I could not.

Q. I will ask you to state whether or not you knew prior to rolling the log off that it would strike the other log in any way. [54—22]

Mr. FERRIS.—If the Court pleases, that is objectionable as calling for a conclusion of the witness.

The COURT.—He may state whether he saw the other logs there.

A. I saw the other logs there, but did not see—that is, did not see the condition they would fall in.

Mr. ROBERTSON.—Q. Or did you know prior to the falling of that log that either of them would or were likely to strike you? A. No, I did not.

Q. I will ask you to state what instructions, if any, were given you by the foreman as to the manner of doing this work.

Mr. FERRIS.—That is objected to on the ground there is no charge in the complaint that we failed to instruct, and from the facts detailed by the witness it is plainly evident that the work was of such a character that no special instructions were necessary.

(Testimony of John Joseph O'Connell.)

Mr. ROBERTSON.—We have authorities on that at the proper time to present in exactly the same shape.

Mr. FERRIS.—I do not think there is any charge in the complaint that we failed to properly instruct. I do not recall any such allegation.

Mr. ROBERTSON.—We aver he was inexperienced and did not understand the nature of the work and they failed to furnish him a safe place. Now, the question [55—23] of instructions becomes competent under that allegation as to inexperience.

The COURT.—The failure to instruct in a case of this kind is the specific act of negligence as a rule.

Mr. FERRIS.—The act of negligence charged in this complaint as I gather it is an inefficient light.

The COURT.—There is more than that charged I do not know whether there is a charge of failure to warn or not.

Mr. ROBERTSON.—Our contention on the construction of the complaint is this, if your Honor pleases, that this boy was young and inexperienced and placed in a dangerous place by doing this work, without knowledge of the dangers inherent in the work at that time and of insufficient experience to comprehend them, and while so working in this dangerous place, his inexperience being known to the defendant company, he was injured. Now, then, it is entirely competent for us to show that he was not only inexperienced, but that his inexperience had not been taken away from him by any directions. Of course, I think that might be, under this character

of complaint an affirmative matter that they would have to show in combating the claim of inexperience, that he had been instructed fully. It seems to me it is competent in the first instance to bring it before the jury that he was not instructed or that he was. [56—24]

The COURT.—In a case of this kind, if I remember the rule correctly, negligence consists of two elements,—one of putting an inexperienced boy to work in a dangerous place, and the other a failure to warn him against the danger. The pleading here charges one but not the other.

Mr. ROBERTSON.—Well, I will ask you Honor to permit this proof and deem the complaint, if your Honor thinks it is not admissible under it, to be amended. I see the foreman here—I am informed that he is, the man who employed him, so there would be no question about that fact.

Mr. FERRIS.—I have not, of course, considered that question and have not in any way talked with the witnesses that might be necessary or who were present at the time this man was employed. It is a matter I have not investigated at all because we did not expect to meet it.

The COURT.—I am inclined to allow the amendment. I am inclined to think it is necessary, but I am not certain, and the other question I will determine afterwards, as to whether or not you will be forced to go to trial. I will allow you to consult with your witnesses, if you desire.

Mr. ROBERTSON.—I will pass that point at

(Testimony of John Joseph O'Connell.)

present with this witness, and place it before the Court, I think, in a way that will make it material. [57—25]

Q. Did you have any talk with the foreman with reference to what particular method you should pursue in loading those logs?

Mr. FERRIS.—That is the same question, if the court pleases, only another way.

Mr. ROBERTSON.—I think not. That is not the question at all. That is a direction to do the work.

The COURT.—The other objection, of course, goes to the legal sufficiency of the complaint, and I presume we had better determine that question first. I may be in error as to the rule. The rule is, as I stated a while ago, where an inexperienced person is placed to work in a dangerous place two elements go to make up the negligence: first, the fact of his inexperience, and second, the failure to instruct or warn. I think the failure to instruct or warn is a necessary element of your case. If so, of course, it would be necessary to allege it. If you have any authorities to the contrary, I will hear from you.

Mr. ROBERTSON.—I think the other is a broader and better and necessarily, it seems to me, the rule that would apply to this class of cases. While I admit that I urged it without now having the authority that would bear me out in what seems to me to be the rule of reason, and that is this, the law obligates a man to instruct a person who is inexperienced in the work before putting [58—26] him in a dangerous place. Now, his averment that

(Testimony of John Joseph O'Connell.)

he was put to work in a dangerous place while he was of immature intellect it seems to me makes a complete case without regard to whether or not it is alleged that he was or was not instructed, because the allegations of these two conditions place upon the defendant the duty to instruct; it is not necessary for us to aver that to make the testimony admissible.

The COURT.—I was simply keeping on the safe side, Mr. Robertson. If the person who employed this man and the foreman was there at the time was present in court, I do not see why there should be any prejudice in allowing the amendment.

Mr. FERRIS.—We might consult with our witnesses a few moments; it might have been there were other people present; I do not know.

Mr. ROBERTSON.—All right; we have no objection to the consultation.

The COURT.—I may be in error as to the rule, but I know we considered it in the Supreme Court in a great many cases.

Mr. FERRIS.—The witness we have explains that Mr. Rud, who was working with this man in the same kind of work, was an experienced man and that this witness was placed working with Mr. Rud and that Mr. Rud explained to him in detail how these things should be done. [59—27] In our investigation of this case that point has not been anticipated at all, as to what Mr. Rud would testify to, and he is the witness and the only witness to the accident. Now, then, if they make that amendment, unless we can have time to find out the facts from Mr. Rud, we are

(Testimony of John Joseph O'Connell.)

placed in a position of going to trial upon an issue which we are not prepared to meet and which we have not had time to investigate. That is the situation as told to me by the foreman.

Mr. ROBERTSON.—I am not asking now to get the amendment over the objection. Other witnesses are here at this time, but I shall proceed upon the theory that I have been and put in the case and then, as I say to your Honor, either submit the authorities at noon hour here or ask to amend later on.

The COURT.—I will admit the testimony subject to the objection and determine the question later.

Mr. FERRIS.—Very well.

Mr. ROBERTSON.—I think maybe I can even obviate that objection. Of course, I want to do it if I can.

Q. Was or was not or did or did not the foreman show you in what manner the cables should be attached to the logs prior to the happening of your injury, to pull them off the train?

Mr. FERRIS.—That is objected to on the ground it is not within any issue here. There is no charge that we [60—28] did not have the cable properly on those logs.

Mr. ROBERTSON.—I think it is entirely competent to show the orders—under whom he was working there.

The COURT.—The witness may testify as to whether he was warned in any way against the dangers incident to the unloading of these logs, but I think you are getting back of the real ground of the

(Testimony of John Joseph O'Connell.)

negligence in this question.

Mr. FERRIS.—That is subject to our objection?

The COURT.—Yes, sir.

Mr. FERRIS.—Very well.

Mr. ROBERTSON.—Q. State whether or not you talked with the foreman with reference to any danger with reference to removing these logs.

Mr. FERRIS.—I think the witness should be required to state what the foreman told him, if anything.

The COURT.—That is in substance the question he asked.

Mr. ROBERTSON.—Q. Go ahead and state it.

The COURT.—You may answer the question.

A. He told me nothing before, only showed me how to run the cable, and told me to watch for logs coming from the top of the load when I knocked the hook; that was the only instructions he gave me.

Mr. ROBERTSON.—Q. Now, state to the jury what, if anything, you told the foreman with reference to your [61—29] experience.

A. I told him I did not have any experience whatever in that kind of work.

Q. Now, please state to the jury how you were hurt, how badly you were injured and in what manner.

A. Well, my knee was mashed right across here (indicating), and the muscle in front here is broken, and there is something in here that catches me and at times gives me pain; my leg pains me; my leg pains me all the time, even when I lie like that, there

(Testimony of John Joseph O'Connell.)
is a pain right in there, and I cannot stretch it out, that is, right out, I cannot pull it up; I have no purchase on the front of my leg at all, and then I have pains through my head here where I was hit, and right in there especially (indicating).

Q. State about your eyes.

A. And one eye has bothered me a good deal; this one here has been bothering me, and this one here is pretty near shut.

Mr. FERRIS.—If the Court pleases, this last testimony, I do not think there is any allegation of any special damages with reference to the eyes. I may be mistaken about that, however.

Mr. ROBERTSON.—Q. State with reference to your jaws or teeth.

Mr. FERRIS.—Just wait until we settle this question [62—30] here.

The COURT.—I do not think there is anything in the complaint in reference to his eyes. I do not see anything.

Mr. FERRIS.—That testimony then will be stricken.

The COURT.—That will be stricken.

Mr. ROBERTSON.—I think, of course, the right side of his head was severely injured and bruised. Now, the eyes are on the right side of the head, on either side of the head.

The COURT.—You go on and testify the particular nature of the injury, Mr. Robertson. I think you are limited to the specific statement.

Mr. ROBERTSON.—All right.

(Testimony of John Joseph O'Connell.)

Q. State whether or not in any manner your jaw or teeth were injured.

A. My teeth have been bothering me ever since. It killed the nerves or something in them; they went to pieces; there was a dentist told me—

Mr. FERRIS.—Just a moment. We object to what the dentist told you.

Mr. ROBERTSON.—Q. Can you show the jury where that is, where the teeth hurt your head?

A. Right back there (indicating), those back teeth.

Q. Please tell the jury just how this log cut your [63—31] face.

Q. When I went to the hospital I had a cut across there (indicating), one gash across my face, and there is where there is one scar, that is the only one, and then this whole side of my face was all bruised and my nose here was broken.

Q. And I will ask you to state how deep that cut was. A. I could not tell how deep.

Q. Did they sew it up or not?

A. No, they did not sew it up; I don't know what he put on it.

A JUROR.—Your Honor and counsel, may I examine those teeth?

A. I have no objection.

Mr. FERRIS.—I have no objection whatever.

(A juror thereupon examined teeth of witness.)

Mr. ROBERTSON.—Q. Have you been to a dentist since that time?

A. Yes, sir. I was to a dentist here last spring

(Testimony of John Joseph O'Connell.)

and had them all fixed up, that is, all filled and drilled out; he took one out here and one there and then he drilled a hole in another one back there and took the nerve out; it was hurting me.

Q. Built up a tooth on the root?

A. Yes, sir; I wear a crown there; there is a cap [64—32] here, that gold one, and that one is taken out (indicating).

Q. How much were you able to earn before that time—what were you getting?

A. I never earned less than $2.50 a day.

Q. At the time of the injury what were you getting? A. 25 cents an hour.

Q. What have you to say with reference to the amount of education you have?

A. I did not have very much education—have not.

Q. Prior to that time, state to the jury whether or not you were a ball player.

Mr. FERRIS.—That is objected to on the ground there is no allegation here—

The COURT.—What?

Mr. FERRIS.—A baseball player.

Mr. ROBERTSON.—I am not asking any money for it; I just want to show his activity. That is the only purpose of it.

The COURT.—I think that is sufficiently to the jury; he is an able-bodied boy except for the injury he received.

Mr. ROBERTSON.—Q. State to the jury whether or not since this injury you have endeavored to do any work such as firing on an engine.

(Testimony of John Joseph O'Connell.)

A. I have.

Q. Tell the jury how, if any way, you were affected [65—33] by that injury when performing that work?

A. I went on the Milwaukee, on the next division, I washed engines there for a while, the oil-burners, and they took me out on a coal burner, one of their smallest engines they have, and I worked about three days, about ten tons of coal is about what they burn, and I worked there three days and I had to quit and my leg gave out on me altogether, I could not do anything, I laid around two weeks before I could walk.

Q. Is there any difference in the size of your legs?

A. Yes, sir; it is smaller; the foot is smaller, smaller all the way up and smaller at the knee.

Q. State to the jury whether or not before that time you were active.

A. I was active; I never knew before I was hurt what it was to be tired; I could run all the time, night and day.

Q. And state to the jury with reference to carrying heavy loads of timber and stuff.

A. I could carry heavy loads before I was hurt. Now I cannot. Well, I can carry 50 or 75 pounds, that is, by using it on my right shoulder.

Q. Is your foot getting any better or your leg getting any better? A. It is getting worse.

Mr. ROBERTSON.—Take the witness. [66—34]

(Testimony of John Joseph O'Connell.)

Cross-examination.

(By Mr. FERRIS.)

Q. Now, Mr. O'Connell, just what work have you done since the accident? Start in from the time of the accident and tell us where you were first employed.

A. Well, when I went back to Potlatch I went to catching edgings.

Q. How long after the accident was that?

A. That was on May the 2d or 3d.

Q. May the 2d, and you were injured in February? A. Yes, sir.

Q. About three months, then, after the accident you went back? A. Yes, sir.

Q. You went back catching engines, you say?

A. Catching edgings.

Q. Oh, catching edgings. How long did you work at that? A. I worked two months.

Q. What wages did you receive at that work?

A. $2.15 a day.

Q. After working there two months, where did you next work? A. The box factory.

Q. That is the same company?

A. Yes, sir. [67—35]

Q. And how long did you work at the box factory?

A. I worked there seven or eight days.

Q. And what were your wages there?

A. Two and a quarter, I think.

Q. Two and a quarter. Where did you next work? A. My next was sweeper.

Q. With the same company?

(Testimony of John Joseph O'Connell.)

A. Yes, sir; in the mill at nights.

Q. How long did you continue in that employment?

A. Well, there could be no definite time set in that, because we only run—

Q. I mean what length of time did you work as a sweeper?

A. Well, I worked there from the 28th day of July up until along towards the last of September; that is, not every night; there was only a night or two at a time they would run; they did not run steady.

Q. Whenever there was any of that work to be done you did it during that time from July to September, as sweeper?

A. Yes, sir; that is, on one end of the mill, the lower end.

Q. What wages did you receive at that work?

A. I think it was $2.15.

Q. And where were you next employed?

A. I was next employed lathing. [68—36]

Q. The same company? A. No, sir, for Carr.

Q. Where? A. At Potlatch, Idaho.

Q. What kind of work was that? Just what did you have to do? A. Lath.

Q. How long were you employed at that work?

A. I stayed there about ten days.

Q. What were your wages?

A. Two dollars and fifty cents.

Q. And where were you next employed?

A. On the Milwaukee Railroad.

(Testimony of John Joseph O'Connell.)

Q. And how long?

A. I was one month looking after switch lamps.

Q. One month looking after switch lamps?

A. Yes, sir, looking after switch lamps and walking track.

Q. How many switch lamps did you have to look after? A. 21.

Q. And over what distance were they spread?

A. They were spread over within a mile.

Q. In a mile? A. Yes, sir.

Q. What were your duties there—what did you have to do with reference to that? [69—37]

A. Just fill the switch lamps and clean them and see that they were all burning.

Q. How often would you have to make the trip?

A. I would make a trip to fill them once every three days.

Q. Well, to see if they were burning, for instance?

A. I would ride down on the engines to see if they were burning.

Q. When? Every night? A. Yes, sir.

Q. You did not have to walk any working there?

A. No, I did not have to walk; they were switching all the time.

Q. You said something about you were track-walker? A. Yes, sir.

Q. What duties did you have in that?

A. I walked four miles of track one day and came back on the train.

Q. Just walked four miles and rode the other four? A. Yes, sir.

(Testimony of John Joseph O'Connell.)

Q. You did that for a period of about a month?

A. Yes, sir, I did that for about a month.

Q. Where next were you employed?

A. I went then as engine watchman.

Q. When you were track walker or watching these lights what were your wages? [70—38]

A. $1.65, I think it was.

Q. Now, you say you were watching engines?

A. Yes, sir.

Q. The same company?

A. The same company.

Q. How long?

A. I worked from the 3d day of December until the 1st day of January.

Q. About a month? A. Yes, sir.

Q. What did you have to do there?

A. I had practically nothing to do only just look after the engines, keep water in it.

Q. That was night work, was it?

A. Yes, sir; 12 hours.

Q. What were your wages there?

A. Two dollars.

Q. That is the 1st of January, 1912?

A. No, sir, the 1st of January, 1911.

Q. 1911. That is a year ago last January?

A. Yes, sir.

Q. After January 1st, 1911, where did you first work? A. Three days firing engines.

Q. That is the three days you have testified to?

A. Yes, sir. [71—39]

Q. Where you had to quit on account of the heavy

(Testimony of John Joseph O'Connell.)

work? A. Yes, sir.

Q. Where next did you work?

A. They put me watching oil-burners at the helper station.

Q. How long were you there?

A. I stayed there for three days and then I laid off until the 16th.

Q. Of January?

A. Yes, sir, and then I went watching the oil-burners and stayed there until the 18th of March.

Q. That was for the Milwaukee? A. Yes, sir.

Q. What were your duties there—what did you have to do?

A. Just to watch the engines, keep a little fire and steam up.

Q. That was night work, too, was it?

A. Yes, sir.

Q. What were your wages? A. Two dollars.

Q. After that where were you next employed?

A. The next employment was for the Spokane & Inland.

Q. And when did you commence to work for them? **[72—40]**

A. I commenced to work for them on July 20th, 1911.

Q. And what work were you doing for the Inland?

A. Clerk in the purchasing department.

Q. How long were you there?

A. I am still there.

Q. And what wages?

A. Sixty dollars a month.

(Testimony of John Joseph O'Connell.)

Q. That has been your wages ever since July, 1911, sixty dollars a month? A. Yes, sir.

Q. You did not have any employment between March and July, of 1911? A. No, sir.

Q. What did you do during that time?

A. Which time?

Q. March and July, 1911.

A. Staying around home.

Q. How many nights were you employed unloading these logs prior to the accident?

A. I could not say whether it was two or three nights.

Q. But it was several nights anyway prior to the night of the accident?

A. It was not over four nights.

Q. Not over four?

A. No, sir, to my knowledge it was not only the [73—41] third night.

Q. Well, you had worked there anyway at least two or three, possibly four, nights prior to the accident; you are not sure of the exact number, but anyway two or three? A. Yes, sir.

Q. How long would these trains usually be, how many cars would there usually be in them?

A. Well, the night before I got hurt there was 26 cars, and the night I was hurt there was 27.

Q. There was about the average string then the night you got hurt? A. Yes, sir.

Q. Then, as I understood you, the crane first unloaded all the logs that would come off with the cable? A. Yes, sir.

(Testimony of John Joseph O'Connell.)

Q. Who handled this train in the handling of the logs? A. Whittie West.

Q. Whittie West? A. Yes, sir.

Q. Did he do that all alone?

A. There was another man with him that night.

Q. What is it?

A. There was another man with him that night; I cannot recall his name. **[74—42]**

Q. Who attached the chain to the cable so that they could unload them—did you have anything to do with that? A. Rud. and I attached it.

Q. So that you assisted in getting the logs off that would come off with the cable? A. Yes, sir.

Q. And you had been doing that for the two or three nights prior to the accident? A. Yes, sir.

Q. And how long would it take you to remove the logs that were left on the cars, on the string of cars after the cable had taken off those that it did take off?

A. It just depended on how many short logs we had.

Q. Well, on the night of the accident how many cars of short logs did you have? A. Two, I think.

Q. Had you unloaded the other car that had any short logs on it prior to the accident?

A. I think there was one log left upon it.

Q. One log left on it. Had you taken any off of it?

A. We had loaded what the crane would take off. I could not say whether we rolled that other one off or not, but there was only two cars that night. **[75—43]**

(Testimony of John Joseph O'Connell.)

Q. The crane unloaded all the others?

A. Yes, sir.

Q. This car upon which you were working at the time of the accident, how many logs were there on that car? A. Three.

Q. And what approximately were the dimensions?

A. I think they was a foot and a half, one of them, and one twelve; two of them twelve inches, I think, I should judge.

Q. How were those logs laying upon the car—will you illustrate there to the jury with three of those sticks?

A. (Illustrating.) These ain't long enough; they ain't the right shape. Something in that shape.

Q. How did you come to start to unload the log that you were working on at the time of the accident —how did you come to start on that log?

A. I could not tell you how we did come to start to unload it. I was told to get up there and unload them logs.

Q. Yes; and you were doing that at the time?

A. Yes, sir.

Q. Now, on which end of that log and whereabouts were you? A. Right in here some place.

Q. And where was Mr. Rud? **[76—44]**

A. Out here (indicating).

Q. And what were you doing?

A. I was rolling on the log.

Q. Well, what with? A. A cant-hook.

Q. Just explain to the jury what a cant-hook is.

A. Well, a cant-hook is about six feet long, a

(Testimony of John Joseph O'Connell.)

handle on it with a point on it and a hook.

Q. How did you use it to move the log?

A. The hook is catched on here and you get the pry from the top of it.

Q. What was Mr. Rud doing?

A. He was working there with me—that is—

Q. With a cant-hook, too?

A. Yes, he had a peavy.

Q. You each had a peavy or a cant-hook?

A. Yes, sir.

Q. Did you know how many logs were on that car?

A. I could not say whether there was three or four for sure.

Q. How do you know that the logs were lying in that position?

A. They were usually in that position, or something down like (indicating).

Q. How do you know that?

A. What? [77—45]

Q. How do you know that?

A. Well, I took a glance at them is all I have a recollection of.

Q. In other words, you took a look at the logs and decided you would unload that one you have up there on the edge; is not that a fact?

A. I did not decide; I was told to.

Q. Who told you? A. The foreman.

Q. And he did not tell you to unload that particular one first, did he? A. Yes, sir.

Q. He pointed that one out to you?

A. He says, "Get them logs off of there and that

(Testimony of John Joseph O'Connell.)

one over on the other side will come off first.

Q. He said, "That will come off first."

A. Yes, sir; that is what I understood him to the best of my knowledge.

Q. Where were you then?

A. I was on the ground on this side (indicating).

Q. Where was he? A. He was with us.

Q. Where was Mr. Rud?

A. He was there thereabouts.

Q. You were all on the ground?

A. Yes, sir. [78—46]

Q. Then what did you do?

A. We crawls up on the car.

Q. Did you look at any of the logs when you got up on the car? A. Which way do you mean?

Q. Did you look to see how many logs there were or how they were lying?

A. I did not see how many there were, not at all.

Q. Did you notice how they were lying?

A. Not any particular way, only that is the way (indicating). I would not say whether there was three or four logs, but something like that they were lying (indicating).

Q. This log that you attempted to roll off, how long did you say that was?

A. I could not say to the length of that log.

Q. Well, approximately. A. Sixteen feet.

Q. Sixteen feet. Now, the other two that you have there.

A. One eighteen and maybe the other is sixteen. I could not say.

(Testimony of John Joseph O'Connell.)

Q. Eighteen or sixteen, you think. And you say there was snow and ice on the car. A. Yes, sir.

Q. How did you know that? [79—47]

A. Because all the cars had snow and ice on them.

Q. Did you see any on this car? A. Yes, sir.

Q. You could see that, could you?

A. No, we could feel it.

Q. Well, could you see it?

A. I could not say that I could see the snow; there was bark, snow, slippery, and it was filled up at the top, at the bunks, that is, we could not tell exactly where the bunks was, this bunk here especially.

Q. On account of the snow and ice?

A. Snow, bark and ice, I suppose.

Q. Was there bark on the car?

A. I could not say; most of them there was.

Q. Was there on this particular car?

A. I could not say.

Q. You do not know whether there was any bark there or not. Did you look to see?

A. No, I did not.

Q. Who took hold of this log first when you got on the car?

A. I could not say who took hold of it first, whether it was me or Mr. Rud.

Q. Who got on the car first?

A. That I could not say.

Q. Now, on the evening before the accident how many [80—48] cars had you unloaded with logs lying on them after the crane had removed some?

A. Two or three.

(Testimony of John Joseph O'Connell.)

Q. And the evening before that.

A. I do not think there was any the evening before that.

Q. Then you only unloaded cars on one evening before the accident?

A. Well, I do not think there was any short logs if I unloaded any more. I cannot remember any logs being on cars, if there was.

Q. And how were the logs lying on the cars that night?

A. They were lying in a position something like that, across like that (illustrating); maybe one or two, I could not say which.

Q. And you rolled them off with Mr. Rud, did you?

A. Yes, sir.

Q. Where with reference to the cars on which you were working was the light located and in which direction?

A. Somewhere over in this direction, back here, down this way (indicating).

Q. And how far?

A. Oh, one hundred or one hundred and fifty feet from where we were.

Q. And what kind of a light was it? [81—49]

A. It was an arc-lamp.

Q. How large? A. I could not say.

Q. Well, was it as large as one of the street arc-lights?

A. No, sir, it did not give as much light as these street lamps here.

Q. It was almost as large an arc-light, though.

(Testimony of John Joseph O'Connell.)

Weren't they as large as these in size, I mean?

A. I could not say.

Q. How far was the next light?

A. I could not say.

Q. Approximately, about? A. 150 feet.

Q. Were there lights located at different points about 150 feet apart, do you think?

A. Maybe 200 feet, I think; I could not say for sure how far.

Q. Every so often there was an arc light the same as the one that was located 150 feet or thereabouts from the car? A. Yes, sir.

Q. Isn't it a fact that there were lights up and down both sides of this pond you speak of?

A. No, there is no lights on this side of the pond (indicating), or was not at that time. [82—50]

Q. Where were they?

A. They were back along the track somewhere over here (indicating).

Q. So that the cars would be between the lights and the pond? A. Yes, sir.

Q. And you think about 150 feet away from the cars?

A. I think it was over this way about 150 feet.

Q. Was there any lights in this direction, towards me, from where you were? A. I could not say.

Q. Don't you know whether there were lights down that way or not?

A. We were pretty well up towards the other end of the pond. I could not say whether there was another one there or not.

(Testimony of John Joseph O'Connell.)

Q. You would not say whether there was or was not? A. No.

Q. I think you may sit down now. How long was it prior to the time you started to throw the logs off that you had taken them off with the cable, taken the others off?

A. Well, that may be a half hour, maybe three-quarters.

Q. The cable, as I understood you, was around the logs so that it made a sort of a bundle, we might say.

[83—51] A. No, sir, it was not.

Q. As I understood your explanation, you had all of these fixed in such a way that when the cable raised up it threw all of those off except the short ones—

A. Now, the logs are loaded on the car—that there is supposed to represent a car, and I don't remember ever seeing short logs; they may be on top; but I don't remember seeing any short logs loaded with long logs.

Q. That is not what I am asking you. I am asking you if the cable, when you start to unload is not around all the logs? A. It is underneath the logs.

Q. It is underneath all of them? A. Yes, sir.

Q. Now, then, the force is applied in such a way that the cable—the force is applied in such a way that it pulls that cable straight up, is all.

Q. And raises all the logs with it and all of them go off, if I understand you, except those pieces that are so short that they fall off; that is the fact.

A. Yes, sir; slide either way.

(Testimony of John Joseph O'Connell.)

Q. You helped, did you, to unload the logs from this car with a cable that night?

A. Yes, sir, I did.

Q. And the cable was under all the logs on the car? [84—52] A. Yes, sir.

Q. But in raising the logs and in taking them off three were too short and fell out from under the cable and remained on the car? A. Yes, sir.

Q. How many minutes would you say that was prior to the time you came back to unload those three logs?

The COURT.—He said about half an hour awhile ago.

Mr. FERRIS.—Very well.

Q. You think it was about half an hour to your best judgment? A. I should think so.

Q. You were fully aware of the fact, weren't you, Mr. O'Connell, that if that log in rolling off hit the end of another that it might possibly fly around and hit somebody?

A. No, sir, I was not aware of the fact.

Q. You did not know that then?

A. No, sir, I did not.

Q. You did not know that if one body such as a log, would strike another on the end that possibly it might fly up and hit you; you did not know that?

A. No, sir, I did not.

Q. What did you think would happen if this log in falling off struck the end of another log?

A. I did not think it could fall off; that is, [85—53] I thought it would roll straight off, would have

(Testimony of John Joseph O'Connell.)

been my opinion of it.

Q. You thought it would roll straight off? You did not go to the end of these logs to examine which were on top or which were underneath, did you?

A. No, sir.

Q. You could see that from where you stood right here, couldn't you?

A. I was not far from the end of the logs.

Q. You were not over six or eight feet, were you?

A. Not much more.

Q. And you could see whether this was on top or underneath, couldn't you, from where you stood?

A. That is why I could not give you a definite answer a minute ago on the length of that log, for I could not see the end of it.

Q. You mean to say from where you stood there you could not see six or eight feet?

A. You could see black, that is all, the log.

Q. You could see the black log?

A. Yes, sir, you could not see the end of it out where it stuck over the car.

Q. You could not see that it had snow underneath?

A. In some places.

Q. But you could not see from where you were standing to the end of this log six or eight feet away? A. You could see the log. [86—54]

Q. Could you see whether this log was on top or underneath?

A. I would not say whether it was on top, but I don't think it was underneath.

Q. As a matter of fact, you did not pay much at-

(Testimony of John Joseph O'Connell.)

tention, did you? A. No, sir.

Q. You did not look to see whether it was on top or underneath? A. No, sir.

Q. You just went ahead and started to roll it off?

A. Yes, sir.

Q. And that is the way you had done with any other log that you had rolled off while you had been there? A. Yes, sir.

Q. There was nothing unusual about the rolling off of this log at all, was there?

A. No, sir; I was just told to roll it off and I rolled it off according to instructions.

Q. How far away was the pond, Mr. O'Connell, from the car where you rolled these logs off?

A. Right down straight from the end of the bunks.

Q. About how many feet? A. You mean down?

Q. Yes.

A. Maybe six or eight feet. [87—55]

Q. Could you see the water in that pond that night? A. No, sir, I could not.

Q. What was the position of the car on which you were working with reference to whether or not it was level or slanted in either direction?

A. I could not say.

Q. Now, isn't it a fact that the car or the track there was built in such a way that it slanted toward the pond on the pond side?

A. In some places it was, and others it was not.

Q. And you do not know whether this was one of the places it was or was not?

A. No, sir, I do not.

(Testimony of John Joseph O'Connell.)

Q. Which end of the pond were you nearer?

A. I was up towards the upper end.

Q. The upper end of the pond? A. Yes, sir.

Q. That is the end farthest from the mill?

A. Yes, sir.

Q. And how near the end were you?

A. I could not say.

Q. Well, you were considerably past the middle of the pond? A. Yes, sir.

Q. And up pretty well to the end, you think?

A. Yes, sir.

Q. I think that you have covered this, as I [88—56] recall it, you stated that you had unloaded all the cars with the cable before you came back to get these that were short.

Mr. ROBERTSON.—That was not quite the statement that he had done it.

Mr. FERRIS.—Q. I understood that you had completed the operation, you and the men that were working with you, of unloading all the cars so far as the cable would unload them? A. Yes, sir.

Mr. FERRIS.—I think that is all.

Redirect Examination.

(By Mr. ROBERTSON.)

Q. I will ask you to state what were the wages of a fireman? A. The wages of a fireman?

Q. Yes, sir.

Mr. FERRIS.—That is objected to on the ground it is immaterial.

Mr. ROBERTSON.—I want the employment that he tried to follow and could not get the employment

(Testimony of John Joseph O'Connell.)
that he could follow.

The COURT.—I think that is rather remote.

Mr. ROBERTSON.—Q. State to the jury whether or not that knee of yours does or does not swell.

A. If I walk around on it, say, two or three hours, [89—57] or try to run a block, I can take and feel this bandage that I wear on it all the time tight. When I get up in the morning now it will show a hollow, right around in there, through there, it is hollow; you can see a cord back here; at night when I get to bed that is all filled in, swelled up.

Q. Did you have any examination by Mr. O'Neill the other day? A. Yes, sir, I did.

Q. Was your leg then swelled or not?

A. It was a little swelled at that time.

Q. What was that due to? A. From walking.

Q. And when you walked up and down the track state to the jury whether or not you had any pain doing that work or not. A. At that time?

Q. Yes.

A. No, sir, I had no pain no time that I can remember before that.

Q. Have you walked the track since that time, since your injury, have you walked the track?

A. Yes, sir.

Q. State to the jury whether or not in walking the track since the injury you had any pain.

A. I have pains all the time; that is, through in [90—58] there, and at times if I step on a little stone or something and turn my foot it will catch me in the knee here, a sharp pain.

(Testimony of John Joseph O'Connell.)

Q. Do you have to limp at any time?

A. Yes, sir, I limp all the time.

Q. How old was the man that was working with you?

Mr. FERRIS.—I object to that on the ground it is immaterial. There is no charge of incompetent servants there.

The COURT.—He may answer it.

A. I should judge about twenty years old.

Mr. ROBERTSON.—Q. Did you have anything to do in the way of directing the way in which the logs were pulled off by the crane or not?

A. No, sir, I had not.

Q. Or where the crane would come to pull them off, did you have anything to do with that?

A. No, sir, I did not.

Mr. ROBERTSON.—That is all.

Recross-examination.

(By Mr. FERRIS.)

Q. There is one question that I overlooked that I would like to ask. The lights were burning the same on the night of the accident that they had been the nights previous. I mean, the same number of lights were there **[91—59]** that night that they usually had.

A. If I remember right, there was one light down.

Q. Where was this light?

A. I could not state right the exact spot, but there was one light down.

Q. Was it anywhere near this car?

A. It could not have been far away from it.

(Testimony of John Joseph O'Connell.)

Q. How far?

A. I would not say which light it was, but there was one down.

Q. Was it further away than this one you saw, say 150 feet? A. Yes, sir.

Q. It was further away? A. Yes, sir.

Q. How much further? A. I could not tell you.

Q. How do you know it was down?

A. Because the man came and put it out; the rope had broke.

Q. How far distant was that from the train you were working on—these cars?

A. It was 100 feet, that is, from the train of cars.

Q. I mean the car you were working on?

A. I have no idea.

Q. Was it 300 feet? **[92—60]**

A. It might have been.

Q. You don't know exactly just where it was, though? A. No.

Q. In your work on the section, what did that work consist of? A. Tamping ties.

Q. Did you have to unload ties from time to time?

A. No, sir, I did not.

Q. Did you have to load any?

A. No, sir, I did not.

Q. Did you have to unload rails from time to time?

A. No, sir, I did not.

Q. Just tamped ties? A. Tamped ties.

Mr. FERRIS.—I think that is all.

Mr. ROBERTSON.—Q. Were you there since the

(Testimony of John Joseph O'Connell.)

accident to know whether the lights were different or not?

Mr. FERRIS.—That is objected to on the ground it is clearly inadmissible.

The COURT.—I sustain the objection.

Mr. ROBERTSON.—That is all.

Witness excused. **[93—61]**

[Testimony of Dr. F. W. O'Neill, for Plaintiff.]

Dr. F. W. O'NEILL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Please state your name to the jury.

A. F. W. O'Neill.

Q. What is your business?

A. Physician and surgeon.

Mr. FERRIS.—We do not question the doctor's qualifications.

Mr. ROBERTSON.—Q. Did you see this young man here, the plaintiff in this action, at any time prior to coming on the witness-stand?

A. Yes, sir.

Q. When?

A. Saturday evening—last Saturday evening.

Q. Did you make any examination of his leg and of his body generally? A. I did.

Q. I wish you would state to the jury the condition of this boy's legs and muscles and foot as you observed.

A. I made a complete physical examination and

(Testimony of Dr. F. W. O'Neill.)

found [94—62] him all right except for this knee, which at that time he was wearing an elastic bandage on. I had him remove it, and the knee was considerably swollen; also, there was some deformity, the knee being bent in. He was not able entirely to extend the leg; that is, get it up straight that way (indicating). He could get it up about that far; that was as far as it would go. The measurements of the leg showed the knee to be nearly twice the circumference of the other knee. The muscles below the knee were smaller than those of the other leg. Those were the symptoms which I was able to elicit myself. There were several subjective symptoms, among which was pains, especially after using the leg for any length of time, inability to stay on it for any length of time on account of pain; the large amount of swelling which would ensue when he was on it for any length of time, and he also complained of headaches, inability to sleep as well as he used to and a certain amount of nervousness.

Q. I will ask you to state, Doctor, assuming this boy was a strong, robust and healthy boy of seventeen years of age, that was struck by a log and thrown from a car down on some logs and injured in his knee, that having taken place more than two years ago, and since that time he had been able to do some work of a lighter character, not lifting heavily upon his leg, and even [95—63] that work when he walked much he suffered from his knee, and his knee is in a condition that you saw it, state to the jury whether or not that condition

(Testimony of Dr. F. W. O'Neill.)

could arise from an injury just as I have indicated it could, and in conjunction assuming that he did receive that injury and he was in a condition that you saw him, state to the jury whether in your opinion he will recover the complete use of his leg and knee.

A. I should say two years having elapsed that there would be no further improvement.

Q. I will ask you to state whether or not such injuries as you have observed on this boy, such conditions as you have observed, are usually accompanied by pain in using the limb in the ordinary walking and matters of that kind? A. Yes.

Q. That is, is the injury to the knee joint painful?

A. Yes, sir.

Mr. ROBERTSON.—That is all.

Mr. FERRIS.—I do not think we care to ask the Doctor any questions.

Witness excused. **[96—64]**

[Testimony of Dr. H. H. McCarthy, for Plaintiff.]

Dr. H. H. McCARTHY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Please state your name to the jury.

A. H. H. McCarthy.

Q. How long have you been a resident of the city of Spokane, Doctor? A. Seven years.

Mr. FERRIS.—We admit his qualifications.

Mr. ROBERTSON.—Q. State to the jury, Doctor, if you saw this young gentleman, when and where

(Testimony of Dr. H. H. McCarthy.)

and what his condition was.

A. I saw him on the 17th of September. He came to my office and I examined him, took the history of his accident and made an examination of his knee. At that time there was very little swelling in the knee. He told me that it used to swell a great deal towards the close of the day when he used his foot and did a great deal of walking. I noted the muscles below the knee. The leg is about a half an inch smaller, the left leg than the right leg. The leg cannot be extended completely; there seems to be a repression of motion, the forward extension. He says it causes him a great [97—65] deal of pain when you attempt to extend it, and the knee seems to be bowed inward so that the leg is not in straight alignment, as much so as the right leg is.

Q. Can you show that condition by an examination of the boy's leg to the jury, Doctor?

A. Yes, if he removes his clothing.

Q. (Addressing the plaintiff.) Step up there.

The COURT.—Do you want to expose the limb, Mr. Robertson?

Mr. ROBERTSON.—Yes, I think so, if the Court pleases; there is nothing gruesome about it, just to show the muscles.

A. I think it cannot be shown satisfactorily without dropping the clothing down.

Mr. ROBERTSON.—We will do the best we can without it.

A. (Exhibited leg to jury.) This is the injury. It is not so noticeable with his clothing. It pushes

(Testimony of Dr. H. H. McCarthy.)

inward more than this one and this is larger than the other. It seems the flexion is good, but the extension is—does that hurt you? (Illustrating.)

Mr. O'CONNELL (The Plaintiff).—Yes, sir.

The WITNESS.—This one is normal. You will notice the condition on the side of the knee here, especially the head of the tibia. [98—66]

Mr. ROBERTSON.—Q. Doctor, from your examination of this plaintiff, I will ask you to state if in addition to your examination, if you heard the question propounded to Dr. O'Neill. A. Yes, sir.

Q. Now, state if the facts are such as I have indicated to you, in your opinion that the condition of that knee would be apt to arise or would arise from the injury that I have indicated to you that he sustained. A. Yes, sir.

Mr. FERRIS.—There is no claim by us that he was not injured.

The COURT.—That seems to be admitted.

Mr. ROBERTSON.—I will ask you to state, Doctor, if you consider that condition permanent?

A. Yes, sir, I think after the length of time it has lasted, two years, or nearly two, that there will be little or no improvement.

Q. State to the jury whether or not that condition has evidenced in that knee would in your opinion impair his power to work as a bridge carpenter or in any work where a man required strength or as a logger, or anything of that kind where a man was required to put all of his weight or load on one leg as well as the other.

(Testimony of Dr. H. H. McCarthy.)

Mr. FERRIS.—I think the jury are competent to pass on that. [99—67]

Mr. ROBERTSON.—I think so too, but I just asked whether or not outside of the investigation there would be any physical condition that the doctor observed which in his opinion would indicate to him that it would or would not impair his capacity to do that class of work.

The COURT.—You may answer the question, Doctor.

A. Yes, sir, I think it will impair his capacity.

Mr. ROBERTSON.—Q. To what extent, Doctor?

A. Well, for hard manual labor I should say it would quite materially impair it; just the extent I could not say, but—

Mr. ROBERTSON.—That is all.

Cross-examination.

(By Mr. FERRIS.)

Q. How long did that examination take you, Doctor? A. Probably half an hour.

Q. You examined him for the purpose of coming here to testify, I assume?

A. I examined him at the request of Mr. Robertson.

Q. You knew at the time you would be called to testify as a result of your examination?

A. I supposed I would.

Mr. FERRIS.—I think that is all.

Witness excused. [100—68]

[Testimony of Catherine M. O'Connell, for Plaintiff.]

CATHERINE M. O'CONNELL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Please state your name.

A. Mrs. O'Connell.

Q. Mrs. O'Connell, where do you live at this time?

A. 01604 Magnolia.

Q. I will ask you to state what your relation is to the boy here? A. He is my son.

Q. Please state to the jury before this accident whether the boy was or was not sober and industrious and free from bad habits.

A. He was sober and industrious and a good boy.

Q. And what was his physical capacity?

A. He was a very healthy boy.

Q. Did he have very much of an education?

A. No, sir; not very much.

Q. I will ask you to state whether or not he had ever worked with a cant-hook or peavy to your knowledge.

Mr. FERRIS.—That is objected to.

The COURT.—It is not very likely she would know [101—69] except by hearsay.

Mr. ROBERTSON.—I say, to her knowledge?

A. No, sir.

Q. I will ask you to state if you saw him after the

(Testimony of Catherine M. O'Connell.)

injury, after he was hurt. A. Yes, sir.

Q. How long afterwards?

A. He was hurt on Saturday morning and I saw him on Sunday morning.

Q. Now, just tell the jury the condition of the injuries that you saw there when you saw him.

A. I did not recognize him. His face was all cut up and swollen so bad and his leg was about three times—

Q. Talk loud.

A. About three times as large as the size of his other, and his face was all cut up and swollen so I did not recognize him.

Q. Have you attended to his leg since the time of this injury? A. Yes, sir.

Q. Tell the jury how it has affected him physically as you observed him.

A. It always has bothered him; it was very bad for five or six weeks after he came home from the hospital, and he always rubs it with liniment and keeps right on off and on and it always bothers him.

Q. What was his age at the time of this accident?

[102—70] A. Seventeen.

Q. Do you know whether or not since that time he has been able to do the same character of lifting as he was before?

Mr. FERRIS.—That is objected to on the ground—

Mr. ROBERTSON.—I withdraw the question.

Q. State to the jury whether or not before the accident or the injury you noticed whether or not

(Testimony of Catherine M. O'Connell.)

he was an active boy.

A. Yes, sir, a very active boy.

Q. Was your husband at home when he went to work there? A. No.

Q. I will ask you to state if at any time it is true that he was loading or unloading logs.

Mr. FERRIS.—That is objected to as immaterial.

The COURT.—I think so.

Mr. ROBERTSON.—That is all.

Cross-examination.

(By Mr. FERRIS.)

Q. You say he was seventeen. When was his birthday? A. On the 4th of March.

Q. This accident happened February 18th, 1910. Now, when was he seventeen?

A. He was seventeen the 4th of March. [103—71]

Q. Following the accident? A. No, before.

Q. You mean he would be eighteen on the 4th of March, 1910? A. Yes, sir.

Q. So that he was very near eighteen at the time of the accident? A. Yes, sir.

Mr. FERRIS.—That is all.

Witness excused.

Thereupon an adjournment was taken until 2 o'clock P. M. of this day, Friday, September 20, 1912, at which time the trial was resumed and the following proceedings were had: [104—72]

[Testimony of Freeman Harris, for Plaintiff.]

FREEMAN HARRIS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CAIN.)

Q. State your name. A. Freeman Harris.

Q. Where do you live?

A. Spokane, Washington.

Q. What was your occupation in February, of 1910?

A. I was car inspector for the W. I. & N.

Q. In what place were you employed?

A. At Potlatch and Palouse.

Q. How long were you engaged as car inspector for that company? A. Six years and a half.

Q. Did your duties take you frequently to Palouse?

A. Every day.

Q. You have heard the testimony of the witnesses about the place where this trainload of cars was being loaded? A. Yes, sir.

Q. How frequently were you at that place?

A. I was there two and three times a day. **[105—73]**

Q. And about the time that the witnesses have testified that this injury occurred?

A. At certain times I was.

Q. During the month of February, 1910, you were there frequently, were you?

A. I was there frequently until 12 o'clock at night.

Q. Do you know the system of lighting that local-

(Testimony of Freeman Harris.)

ity that the Potlatch Company employed?

A. Yes, sir, and the lights.

Q. What was the fact about that being well or poorly lighted?

Mr. FERRIS.—That is objected to as calling for a conclusion.

The COURT.—If he can state positively.

Mr. CAIN.—Q. How was it lighted?

A. The poles were about 140 feet apart about 30 feet from the first track.

Q. Were the lights always kept in repair?

Mr. FERRIS.—That is objected to on the ground it is not material and not competent.

The COURT.—I think I will sustain the objection unless it relates to this particular day.

Mr. CAIN.—Q. State what you know about the sufficiency of that light to enable a person to see while on those cars or passing along by them.

Mr. FERRIS.—I think that calls for a conclusion, [106—74] if the Court pleases.

The COURT.—No, I think not.

Mr. FERRIS.—Very well.

A. Why, a person walking along by them, there is light enough to see plentiful by them.

Mr. CAIN.—Q. Could what?

A. Light enough to see walking along by them or like that.

Q. Looking at the cars or looking to see logs on the cars? A. They could see logs.

Q. Did you find for your car inspection work that that light was sufficient? A. Oh, no—

(Testimony of Freeman Harris.)

Mr. FERRIS.—That is objected to on the ground it is immaterial.

The COURT.—I do not think it is a proper criterion. I presume a man would need a pretty good light to inspect a car.

Mr. CAIN.—Q. Did you ever observe a fog rising from the pond there?

A. Yes, sir, very frequently.

Q. What effect did that have upon the lights?

Mr. FERRIS.—That is objected to upon the ground that is a matter of common knowledge, the general effect the fog would have. [107—75]

The COURT.—It would obscure the light in a measure undoubtedly.

Mr. CAIN.—Q. Are you familiar with the method of unloading the logs? A. Yes, sir.

Q. Have you had experience in unloading logs?

A. I unloaded logs there myself.

Q. State whether or not that is a dangerous occupation for an inexperienced person.

Mr. FERRIS.—That is objected to as calling for the conclusion of the witness.

Mr. CAIN.—We have authority on that, your Honor.

Mr. FERRIS.—I do not think they have shown that this man is competent to pass on that.

Mr. CAIN.—How were they unloaded?

A. They used the swinging crane there. In the first place, the books was placed in these cables—

The COURT.—Is there any dispute over the method of unloading?

(Testimony of Freeman Harris.)

Mr. FERRIS.—Absolutely none. It is not an issue here.

A. When the cables are tightened up, then the chains are loosened.

Mr. CAIN.—Q. Have you had any experience in removing the logs from the cars that are not taken off [108—76] by the crane?

A. What was left on the cars lots of times.

Q. State whether or not, knowing how they are left upon the cars, that is a dangerous thing for an experienced person.

Mr. FERRIS.—That is objected to on the ground it is calling for the conclusion. It seems to me the witness might tell the general practice of taking those logs off, and the jury can draw their own conclusion from that state of facts; it is not complicated in any way.

The COURT.—It is only a question in my mind as to whether or not it is not a matter of common knowledge.

Mr. FERRIS.—It seems to me it is.

The COURT.—(After argument.) The question, in my mind, is this: it may be that an inexperienced youth would not understand the dangers there, but this jury is not composed of inexperienced youths. This witness has detailed the exact manner in which the accident happened, and it seems to me the jury can say whether that was hazardous or not, and whether the hazard would be known to a man of his experience, or if there is a peculiar hazard that a grown man of average intelligence would not appre-

(Testimony of Freeman Harris.)

ciate; that is the test in this question. I am very strongly inclined to think that it is an insult to the intelligence of this jury to say they [109—77] would not understand the danger incident to that work. However, I will permit the witness to state what these dangers are.

Mr. CAIN.—In view of the objection of counsel that the testimony is not competent and in view of your Honor's view of the matter, which is ours, I will not press that inquiry.

The COURT.—I agree with you as to the law entirely, but I disagree with you as to the question that it requires any particular expert knowledge to know the dangers.

Mr. CAIN.—Does it require any experience to understand the particular use of a cant-hook in moving logs upon a place such as you have heard described?

Mr. FERRIS.—That is objected to for the reason that there is no allegation that that had anything whatever to do with the accident.

The COURT.—I think I will permit an answer to the question.

Mr. FERRIS.—Very well.

A. Well, there is danger, yes, sir.

Mr. CAIN.—Q. What?

A. There is danger.

Q. Well, does it require experience to know how to use one properly?

A. It certainly does. [110—78]

Mr. CAIN.—That is all.

(Testimony of Freeman Harris.)

Mr. FERRIS.—No questions.

Witness excused.

Mr. ROBERTSON.—We rest.

Thereupon Mr. Ferris made an opening statement to the Court and jury on behalf of the defendant, and thereafter the following evidence was introduced in behalf of the defendant: [111—79]

[Testimony of Joe Loehr, for Defendant.]

JOE LOEHR, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FERRIS.)

Q. State your full name. A. Joe Loehr.

Q. By whom are you employed?

A. The Potlatch Lumber Company.

Q. And you were so employed during the month of February, 1910? A. Yes, sir.

Q. How long had you been employed by that company prior to that time?

A. About a year and a half.

Q. What position did you hold, if any, with that company at that time?

A. I was foreman at the pond at the time this man got hurt.

Q. The plaintiff in the action was employed under you at the time of the accident? A. Yes, sir.

Q. Will you explain to the jury the general situation there with reference to the location of the [112—80] pond and the track?

(Testimony of Joe Loehr.)

A. Well, it has been pretty well explained to-day, I see.

Q. The size of the pond, approximately?

A. Well, the pond held 30 to 31 cars, about. I would not just recollect which is right, that is, the dumping pond, and we had 13 arc-lights at about 30 feet, I guess, just so our machines would work; there was 13 arc-lights strung along there; the cars are 41 feet and a half long.

Q. The approximate length of the track was what?

A. Pretty near a quarter of a mile.

Q. About how far distant were these lights from each other?

A. Well, I should say about 100 feet or probably a little more or less, I would not say.

Q. Can you tell the jury approximately the size of those lights?

A. I could not say just the size, but they were big arc-lights, big globes in them, as big as you could pretty near reach around them. (Indicating).

Q. Do you know what candle-power?

A. I could not say exactly, but somewhere around 150 candle-power, I think.

Q. Commencing with the day the plaintiff first came there for employment, state what he first was [113—81] employed to do, if anything.

A. Well, I could not say. I never employed anybody. I did not hire anybody for a certain job.

Q. What did he say when he came to you, if anything, about employment?

A. I don't recollect what he did say, only he

(Testimony of Joe Loehr.)

probably asked for work; it is quite a while ago.

Mr. ROBERTSON.—We object to what he probably did, if he don't recollect.

The COURT.—I sustain the objection.

Mr. FERRIS.—Q. Just state what he was first directed to do when you gave him employment, what his first duties were.

A. I expect he was working on that boat, probably.

Q. What were his duties upon the boat?

A. Measuring logs or running the saw or pulling in logs.

Q. And the boat was located upon this pond that you speak of? A. Yes, sir.

Q. The work there was conducted in the nighttime as well as in the daytime? A. Yes, sir.

Q. In working upon this pond where would the light come from that was furnished for the pond?

A. Well, there was two arc-lights on this boat [114—82] a purpose for the saw business, and then there was some smaller lights around the saws.

Q. What other lights, if any, were around there other than these 13 that you have mentioned?

A. 13 in the one string; there was two on the boat, and there was one under the jack ladder where they put logs. There was 16 arc-lights altogether, and two little small lights that pointed on the saws.

Q. How many nights, if any, had the plaintiff worked in helping you unload logs prior to the accident?

A. I could not say how many nights he worked;

(Testimony of Joe Loehr.)

he might have been there three or four nights or two nights or probably he was only there a couple of nights, as far as I can remember.

Q. Who, if anyone, was working with him?

A. Roy Rudd was working with him.

Q. How long had Roy Rudd been employed there prior to this time?

A. Why, he had been working for me quite a while off and on.

Q. Well, approximately how long?

A. I guess pretty near a year.

Q. How long each evening would it take to unload the logs from the cars that were left there after the crane had unloaded?

A. After the crane left? **[115—83]**

Q. Yes.

A. Some nights it would not take any time at all, and other nights it might take five minutes or ten minutes; it depends on what was left on the cars.

Q. What is the fact as to whether or not the crane would or would not remove most all of the logs from the cars?

A. Well, sometimes there would be a short log or something that would slip through the cable before it got off, if it was icy or anything; the logs would not lay far enough ahead so it would be on one end of the cable, and it would slip off and the cable would come off and the log would fall back on the car.

Q. Now, on the night of the accident, do you recall seeing the particular car upon which the logs were located? A. I do not.

(Testimony of Joe Loehr.)

Q. Plaintiff testified that you directed him to get on this car and throw off the particular logs that they were handling at the time; what is the fact with reference to that?

A. If I did, I do not recollect anything about it.

Q. Where were you at the time of the accident?

A. I was at what they call the pump-house where we eat our lunch nights. I was in there when Rudd came and [116—84] told me the man was hurt.

Q. When who told you? A. Rudd.

Q. How long had you been in the pump-house?

A. Sir?

Q. How long had you been in the pump-house and away from the work?

A. Oh, I might have been in there an hour, generally for an hour at night, or half an hour, something like that. We generally had half an hour for lunch, but then I might have been in there a good deal longer than that.

Q. How long prior to the lunch hour was it that you last saw the plaintiff?

A. I could not say. I might have not seen him after 7 o'clock, after I went to work there, and I might have seen him probably fifteen or twenty minutes before he got hurt, as far as I can remember.

Q. Now, on the night of the accident, and the night previous what were his duties there, what was he employed to do?

A. Why, he was not employed for no certain job. We did not have anybody there for a certain job—

(Testimony of Joe Loehr.)

take whatever would come along.

Mr. ROBERTSON.—I move to strike that part about did not have anybody for a certain job; the reference [117—85] is to the plaintiff only.

The COURT.—Yes, he said he was employed generally to do whatever came along.

Mr. FERRIS.—Q. Who directed the plaintiff with reference to what work he would perform?

A. I would tell him if I had anything for him to do, I would tell him what to do.

Q. What character of work did the man Rudd do?

A. He done all work around there, too, only when the cars come in he would help unload them and then he would do whatever there was to do around there.

Q. Were he and the plaintiff employed to do the same kind of work?

Mr. ROBERTSON.—To that I object on the ground it is not competent.

The COURT.—I doubt if it is material.

Mr. FERRIS.—Q. What was the man Rudd doing on the night of the accident?

A. Why, he was unloading logs.

Q. What is the fact as to whether or not on the night of the accident it was a clear night or otherwise, if you remember?

A. I could not remember whether it was a clear night or not.

Q. What is the fact as to whether or not the men engaged upon the cars could see the logs with the lighting [118—86] system you had there?

Mr. ROBERTSON.—To that I object on the

(Testimony of Joe Loehr.)

ground that the witness testified he could not remember the condition of the night; he has not shown any knowledge of it that would warrant him in testifying; it is a conclusion of the witness, not based upon any facts sufficient to draw a conclusion.

The COURT.—If he knew the conditions that existed there generally over a long period of time, I think he might testify to it.

Mr. FERRIS.—He testified he had been there a year and a half.

The COURT.—You may answer the question.

A. Why, we always unloaded the logs no matter whether it was a good moonlight night or a dark night, it was just the same, whoever was there unloaded them if the crane did not throw them all off, they got up there with the peavies and throwed them off.

Mr. FERRIS.—Q. Now, particularly calling your attention to this night, in throwing off these three logs what was necessary to be done by the plaintiff?

A. Why, not very much, only to get up there with a peavy or a cant-hook and roll them off.

Q. Do you remember seeing these logs at all on the night of the accident?

A. I do not, sir. **[119—87]**

Mr. FERRIS.—I think you may take the witness.

Cross-examination.

(By Mr. ROBERTSON.)

Q. You had a man doing the work in the pump-house, did you? A. Sir?

Q. You had one particular man to stay in the

(Testimony of Joe Loehr.)

pump-house and do the work there, didn't you?

A. I had nothing to do with the pump-house.

Q. I thought you said you were there half an hour before supper or more, maybe an hour?

A. I say, I might have been in there.

Q. What were you doing?

A. I was in there when Rudd came in.

Q. What were you doing?

A. Sitting down or eating my supper, probably.

Q. You said you were there an hour before supper; what were you doing there before supper?

A. Probably sitting down with the man running the pump?

Q. Sir?

A. Probably sitting down with the man running the pump, talking to the man running the pump. I sat in there for hours at a time?

Q. At night? **[120—88]** A. Yes, sir.

Q. The colder the night the longer you would sit, wouldn't you? A. You bet you.

Mr. FERRIS.—I object to that on the ground that is not material.

Mr. ROBERTSON.—This particular night was extra cold, wasn't it?

A. I could not remember whether it was very cold or not.

Q. Do you remember the circumstances of the boy telling you of his feet becoming wet?

A. I don't remember it.

Q. On any night—that night or the night before?

A. I cannot remember of his ever telling me so.

(Testimony of Joe Loehr.)

Q. Well, will you say he did not tell you, or you did not excuse him to go home the night before?

A. He never asked me, not that I can recollect.

Q. You say you hired men, did you?

A. I hired men.

Q. And you fired them? A. And I fired them.

Q. And you watched them? A. Yes, sir.

Q. And you superintended them? A. Yes, sir.

[121—89]

Q. And if they did not suit you in doing work in one way you would tell them to do it another?

A. Yes, sir.

Q. And you bossed the loading and unloading of the logs? A. Yes, sir.

Q. It was your job to do that, whether you did or not? A. Yes, sir.

Q. You were to see that those logs got off, weren't you? A. Certainly.

Q. Now, you say sometimes when a log was full of ice it slipped out of the cable? A. Yes, sir.

Q. That time of the year lots of the logs would be covered with a sheet of ice, would they not?

A. Yes, sir.

Q. And that made them handle differently than if they had not been covered with ice when you used a peavy on them or a cant-hook? A. Yes, sir.

Q. In other words, they would hold in a log when the bark was not frozen, or when the body and bark was frozen the pick would not catch it, I mean, the pick of the cant-hook would not catch it, the tooth of the hook, rather? [122—90]

(Testimony of Joe Loehr.)

A. No, it would not catch the wood; no.

Q. So that there was a different degree of danger in moving or not moving those logs that you knew on that night, if they were covered with ice or if they were not?

Mr. FERRIS.—I object on the ground that there is no testimony that those logs were covered with ice that the plaintiff was handling.

The COURT.—I think probably that is a matter of common knowledge, also, that logs would slip easier when covered with ice.

Mr. ROBERTSON.—Q. So that in order to work safely on top of the trucks there and knowing just how those logs were going to be moved, it was really necessary to have light enough to see the logs and see the condition of the cars down there (indicating) as to whether or not they were frozen and slippy? A. Yes, sir, you could see that.

Q. And that was necessary for a man to know so he could tell how safe he was or how unsafe he was in moving those logs or not, according to your judgment as foreman? A. I do not understand.

Q. Read the question. (Question read.)

A. Why, a man ought to know how to get up there and do his work, yes.

Q. And of course he had to do it one way when it was [123—91] covered with ice and another way when it was not? A. Oh, no, it is the same thing.

Q. Now, did you notice sometimes the logs came over filled with snow? A. Certainly, lots of them.

(Testimony of Joe Loehr.)

Q. Was this a logging road that these logs would be loaded from?

A. They were loaded out of the woods onto the cars.

Q. Yes, and the snow from the trees as well as the snow falling generally would fall upon those trucks, is that right?

A. There would not much from the trees fall on it.

Q. And sometimes those trucks would wait out there at the siding for as much as a week or ten days waiting for logs to come.

A. I could not say how long they would have to wait.

Q. And frequently the man in loading the logs would have to shove the snow off?

A. He certainly would sometimes if there would come too much on them.

Q. It was necessary, as I understand, to have a light there to do that work? A. Oh, yes.

Q. A proper light? A. They had a light.

Q. Now, you do not know from your recollection whether [124—92] that fog from that pond that night was blowing over the tracks where the logs were or not? A. I do not.

Q. Or whether or not any lights shone at the point where those logs were by reason of a fog or other conditions there?

A. I could not say whether there was a fog there or not.

Q. You testified, I believe, that there was a row of logs or row of lights—I want to draw the track

(Testimony of Joe Loehr.)

nearest to the pond—would that be a straight railroad track?

A. A straight track, just as straight as you could draw it.

Q. I will draw it like that (illustrating).

A. Yes, sir.

Q. Now, beyond the pond would there be another straight track? A. Another track back.

Q. How far back, would you say?

A. It is 16 feet from track center to track center, if I recollect right.

Q. There would be another track over here?

A. Yes, sir.

Q. And the pond would be, say, on this side?

A. Yes, sir.

Q. These arc-lights, you say, were how far off of [125—93] this track? A. Not over 30 feet.

Q. All right, 30 feet; then you say they were 100 feet apart? A. Something like that.

Q. Wasn't it about 150 feet?

A. No; there was 13 arc-lights in the 30 cars' length, and the cars were 41 feet and a half long.

Q. All right, along like that. You do not know whether or not that light or that light or that light was out?

A. I don't know whether there was any of them out, no.

Q. Or whether any of them was burning, according to your recollection?

A. They was burning when I went to work at 7 o'clock, because it was my business to have to turn on the lights.

(Testimony of Joe Loehr.)

Q. How was this pond heated? Tell the jury.

A. Hot water.

Q. Did the hot water discharge from the ordinary operations of the mill into the pond, or did they have a special heating arrangement?

A. From the boilers.

Q. Just the exhaust from the boilers?

A. From the engines.

Q. In February there it is usually below the [126—94] freezing point at night along between 12 and 1 o'clock, probably below zero?

A. Generally about that time; yes, sir.

Q. The heat is enough to keep how much open water there? A. It keeps that whole pond open.

Q. Have you ever passed Hot Lake, Oregon, in the winter? A. No, sir.

Q. Or any hot lake? A. No, sir.

Q. Would you tell the jury whether or not this stuff that arose from this pond was constant—this fog at any time constantly rose or just rose at times?

A. It did not raise all the time, hardly ever.

Q. But when it did raise it covered and obscured everything in its immediate vicinity?

A. Well, to a certain extent it did.

Q. And of course when it rose at all it would extend along here (indicating), wouldn't it?

A. It would rise on the pond.

Q. Yes, this track was right in the pond, wasn't it, right on the edge of the pond?

A. Right on the edge of it.

Q. You could jump it right off from the car into

(Testimony of Joe Loehr.)

the pond? A. Yes, sir. [127—95]

Q. So when there was any steam from that pond it covered the track, did it not?

A. It depends on how the wind was blowing.

Q. You knew that there was some logs that were not off of that train that night?

A. I knew it after Rudd came in and told me.

Q. Wasn't it your business to superintend the unloading of that train of loaded cars?

A. Yes, sir, but I did not have to stand out there all the time and watch them do it.

Q. You do not go in the pump-house and let business go alone, do you, often?

A. I happened to at that time.

Q. You knew that it was a dangerous work on top of those cars, but felt that if a man of experience and knowledge used care he could avoid it?

A. Why, there is danger in all work.

Q. Answer that question, please.

Mr. FERRIS.—I think he did answer it.

The WITNESS.—There is danger in all kinds of work.

Mr. ROBERTSON.—Q. I know, but you knew it was more dangerous in winter than it was in summer?

A. Certainly, any logs standing there with snow and ice, it is more dangerous standing up there in winter time than it was in summer time.

Q. And you knew also that if the logs were moved [128—96] and the thaw come that it would be apt to arise in the boat, didn't you?

(Testimony of Joe Loehr.)

Mr. FERRIS.—There is no evidence of any such state of facts here; I object to it.

Mr. ROBERTSON.—Q. When logs stood near this pond here, was there heat enough to thaw to some extent the snow on the trucks?

A. There was not.

Q. It would affect it some, wouldn't it?

A. Not a bit that I could ever see.

Q. You knew that a boy did not have as much judgment in handling logs as a man, did you not?

The COURT.—That is a matter of common knowledge.

Mr. ROBERTSON.—Q. Did you discuss with this boy at any time what his duties were in handling logs? A. I don't recollect if I did or not.

Mr. FERRIS.—If the Court pleases, that is the same objection we made this morning with reference to the warning, and it will go in under the same objection.

The COURT.—Yes, sir.

Mr. ROBERTSON.—Q. Why didn't you instruct him as to his duties?

A. Why, I probably did not think of it at the time, or something like that. I don't know just why I did not tell him. Probably I did tell him; I don't recollect. He said this morning that I showed him how to put the cable on the car. I don't recollect whether I did or not; **[129—97]** probably I did. I have put men to work there and showed them how.

Q. Told them how to get the logs off and how to

(Testimony of Joe Loehr.)

watch that they did not get hit when they were rolling off?

A. Well, I told some of them; I don't recollect whether I told him or not.

Q. You would tell a green man?

A. Sometimes when I would put a new man there and think of it I would tell him.

Q. You would tell him when you thought it was necessary?

A. I would tell him when I thought it was necessary if I would think about it; if I did not think about it, though, I would not.

Q. If he was inexperienced you would judge it to be necessary, and if he was experienced, you would think he had that knowledge?

Mr. FERRIS.—I object to that.

The COURT.—I sustain the objection. The jury is only interested in this particular case.

Mr. ROBERTSON.—That is all.

Redirect Examination.

(By Mr. FERRIS.)

Q. Do you recall at any time that this fog or mist **[130—98]** that Mr. Robertson speaks of rose from that pond so you could not see your logs if you were on the car? A. No, I don't.

Q. You could always see them, anyhow?

Mr. ROBERTSON.—I object as leading and suggestive.

Mr. FERRIS.—That is all.

Mr. ROBERTSON.—Q. The other boy that was working there was a youth, too, was he not?

The COURT.—He said he was twenty years old.

Mr. ROBERTSON.—Did he say that, if your Honor pleases?

The COURT.—Somebody did, at least; I think it was this witness.

Mr. ROBERTSON.—That is all.

Witness excused.

Mr. FERRIS.—We rest.

Mr. ROBERTSON.—We rest.

[Motion for Verdict in Favor of Defendant.]

Mr. FERRIS.—I desire to make a motion at this time. I desire to move the Court to direct a verdict in favor of the defendant for the reason that the testimony shows not only that the defendant was not guilty of any negligence in the premises, but that any risk that was there was open and obvious, and that the plaintiff assumed any risk in connection with doing the work there; on the further ground, that the injury to the **[131—99]** plaintiff, if brought about by the negligence of anyone other than himself, was the negligence of his fellow-servant Rudd, and the further ground that his own negligence in attempting to remove the logs at a time when he stated he did not exactly understand the conditions under which it was located upon the car charges him with contributory negligence as a matter of law.

The COURT.—(After argument.) I will submit the question to the jury for the present, but the jury are to draw no inference one way or the other from the rulings of the court. The questions of fact

are exclusively for them to determine.

To which ruling the defendant excepted and an exception was allowed.

Mr. FERRIS.—There is one matter that your Honor has not ruled on, as I understand it, and that is some testimony about this warning.

The COURT.—You preserved your exception. Counsel seems willing to rest on his complaint, and I will determine that question later.

Mr. FERRIS.—Very well, with that understanding.

The COURT.—As a matter of precaution, if I was acting for the plaintiff I would amend my complaint, but if you want to stand on it, you can.

Mr. CAIN.—I think that was Mr. Robertson's intention, but I understand the Court can treat the complaint as amended. **[132—100]**

The COURT.—No, the case will have to stand on the complaint as it exists. The testimony went in under objection. I do not want you to go into the case with any misunderstanding. I expressly stated at the time that I would admit the testimony under the objection, and if you made application to amend, I would determine then whether the amendment should be allowed and what condition it should be allowed under and not otherwise.

Mr. CAIN.—I do not know whether Mr. Robertson is laboring under a misapprehension about it or not. I would like to see him a moment.

The COURT.—Counsel on the other side, you will remember, stated what he expected to prove by this absent witness.

Thereupon counsel for the respective parties argued the case to the jury.

Whereupon the Court instructed the jury. Whereupon the jury retired, and after an absence returned into court with a verdict in favor of plaintiff for damages in the sum of $3,500.00, and against the defendant, upon the 20th day of September, 1912.

Thereafter, and within the time allowed by law, the defendant moved the Court for judgment *non obstante veredicto,* and in the event said motion was denied defendant moved the Court to set aside the verdict and grant a new trial. Said motions came on regularly for hearing, both parties being present, and were argued by counsel for the respective parties, and by the Court overruled, to which ruling and each of them the defendant by its attorneys then and there excepted, and the exception was allowed. **[133—101]**

Whereupon, and thereafter, and on the 9th day of April, 1913, judgment was rendered and entered upon said verdict in favor of plaintiff and against defendant, for $3,500.00, the total amount of said judgment being said sum of $3,500 and ——— dollars, costs and disbursements; and now, in furtherance of justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this cause, and prays the same may be settled and allowed, and signed and certified by the Judge as provided by law and the practice of this Honorable Court.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. **[134]**

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem.
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Certificate and Order Allowing and Settling Bill of Exceptions.

This cause came on duly and regularly for hearing before the court on the 14th day of June, 1913, upon application of the defendant for the settling and certifying of its proposed bill of exceptions lately filed herein, the time for presenting, filing and serving said proposed bill of exceptions having been heretofore extended by order of this Court, and the said proposed bill of exceptions having been presented, served and filed within the time allowed by said orders, and the plaintiff having proposed no amendments to said bill of exceptions, and the time for serving or filing any proposed amendments to said bill of exceptions having expired.

Now, therefore, on motion of attorneys for defendant it is ORDERED, that said proposed bill of exceptions heretofore filed by the defendant in this cause, is hereby approved, allowed and settled as the true, full and correct bill of exceptions in said cause, containing in full all the evidence and pro-

ceedings taken and had upon the trial of said cause, and that the same as so settled and allowed be now and here certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, and [135] that the bill of exceptions when so certified be filed herein by the clerk.

The foregoing bill of exceptions is full, true and correct in all respects, and it is hereby approved, allowed and settled, and made a part of the record herein.

Done in open court this 14th day of June, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bill of Exceptions. Received by the Clerk of said Court on May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

Filed, after being allowed and settled by the Court, in the U. S. District Court for the Eastern District of Washington, June 14th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [136]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Assignments of Error.

Comes now the Potlatch Lumber Company, defendant in the above-entitled action, and makes and files the following assignments of error in said cause, which said defendant and plaintiff in error will rely upon in the United States Circuit Court of Appeals for the Ninth Circuit for relief from and a reversal of the judgment rendered in said cause in the above-entitled court, to wit:

1. The Court erred in permitting the plaintiff J. J. O'Connell to testify over defendant's objection that he had not been warned or instructed by defendant with reference to the dangers incident to unloading the logs from the cars (Bill of Exceptions, pp. 23 to 29), to the offer of which testimony defendant objected for the reason that failure to warn or instruct was not one of the grounds of negligence set forth and relief upon in plaintiff's complaint.

2. The Court erred in permitting the witness Joe Loehr to testify over defendant's objection with [137] reference to the warning or instructions which plaintiff had been given in respect to the danger incident to unloading logs from the cars (Bill of Exceptions, pp. 97, 98), to the offer of which testimony defendant objected, for the reason that failure to warn or instruct was not one of the grounds of negligence alleged and relied upon in plaintiff's complaint.

3. The Court erred in refusing to grant defendant's motion to direct a verdict for the defendant, made at the close of all the testimony in the case,

which motion was based upon the ground that the plaintiff had failed to prove that defendant was guilty of any negligence in the premises; that the risks incident to doing the work were open and obvious, and that plaintiff therefore assumed the same. That the injury to plaintiff, if brought about by the negligence of anyone other than himself, was brought about and caused by the negligence of his fellow-servant, Roy Rudd; and for the further reason that plaintiff was guilty of contributory negligence as a matter of law, in attempting to remove the log from the car without first ascertaining in what position it was lying with reference to other logs upon the car; to which ruling defendant excepted, and the exception was allowed.

4. The Court erred in denying defendant's motion for judgment *non obstante veredicto,* for the reasons and upon the grounds and each and all of them, stated in assignment of error No. 3, to which ruling defendant excepted and the exception was allowed.

5. The Court erred in entering judgment upon verdict of the jury in favor of plaintiff, for the reason and upon the grounds and each and all of them, stated in [138] assignment of error No. 3, to which entry of judgment the defendant excepted and the exception was allowed.

The defendant duly excepted to the rulings of the Court in the matter of each of the above errors assigned, and hereby and now assigns each and every

one of said rulings as error.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsements]: Due service of within Assignments of Error by receipt of a true copy thereof admitted this 28th day of May, 1913.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff.

Assignments of Error. Filed in the U. S. District Court for the Eastern District of Washington. May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [139]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem.
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Hororable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit.

Comes now the above-named defendant, Potlatch Lumber Company, a corporation, by its attorneys, and complains that in the records and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said United

States District Court for the Eastern District of Washington, Northern Division, at the April term thereof, 1913, manifest error hath happened to the great damage of this defendant.

Your petitioner further respectfully shows that it has this day filed herewith its Assignments of Error committed by the Court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this, its suit in error.

WHEREFORE, the defendant prays for the allowance of a Writ of Error to the said Circuit Court and for an order fixing the amount of bond for a supersedeas in said case; and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 28th day of May, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. [140]

[Endorsements]: Due service of within Petition by receipt of a true copy thereof admitted this 28th day of May, 1913.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff.

Petition for Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [141]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem.
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error [and Fixing Amount of Bond].

The defendant, Potlatch Lumber Company, a corporation, having this day filed its petition for a Writ of Error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an Assignment of Errors within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of said security all further proceedings of said court be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit; and said petition having this day been duly allowed:

Now, therefore, it is ORDERED that upon the said defendant, Potlatch Lumber Company, filing with the Clerk of this Court a good and sufficient

bond in the sum of Five Thousand Dollars, payable to J. J. O'Connell, a minor, by Catherine M. O'Connell, his guardian ad litem, plaintiff in the above-entitled cause to the effect that if said defendant, Potlatch Lumber Company, and plaintiff in error shall prosecute the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation to be void, otherwise to remain in full force and effect, the said bond to be approved by the Court; that all further proceedings in this suit be, and they [142] are hereby suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

Dated this 28 day of May, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Due Service of within Order by receipt of a true copy admitted this 28th day of May, 1913.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff.

Order Allowing Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [143]

Original.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem.

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Writ of Error.

The President of the United States, to the Honorable Judges of the District Court of the United States, for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Potlatch Lumber Company, a corporation, plaintiff in error, and J. J. O'Connell, a minor, by Catherine M. O'Connell, his guardian ad litem, defendant in error, a manifest error hath happened to the great damage of the said Potlatch Lumber Company, plaintiff in error, as by its complaint appears:

We being willing that error, *that error,* if any hath *been, a* full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 27th day of June, next, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid be inspected, the said Circuit Court of [144] Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 28th day of May, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] W. H. HARE,

Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

By Frank C. Nash,

Deputy Clerk, U. S. District Court, Eastern District of Washington. [145]

[Endorsed]: No. ——. In the U. S. District Court, Eastern District of Washington, Northern Division. J. J. O'Connell, a Minor, by Catherine M. O'Connell, His Guardian ad Litem, Plaintiff, vs. Potlatch Lumber Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Eastern Dist. of Washington. Filed May 28, 1913. Wm. H. Hare, Clerk. By Frank C. Nash, Deputy Clerk.

Due service of within writ by receipt of a true copy thereof admitted this 28th day of May, 1913.

ROBERTSON & MILLER,
Attorneys for Plaintiff. [146]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem.
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, the Potlatch Lumber Company, a corporation, as principal, and the Fidelity & Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland and authorized to do business as a surety company in the State of Washington, are held and firmly bound unto J. J. O'Connell, a minor, by Catherine M. O'Connell, his guardian ad litem, and each of them in the full and just sum of Five Thousand ($5,000) Dollars, to be paid to the said J. J. O'Connell, by Catherine M. O'Connell, his guardian ad litem, their heirs, executors, administrators, legal representatives or assigns, to which payment well and truly to be made we bind ourselves and our and each of our successors, heirs, executors, admin-

istrators and legal representatives jointly and severally firmly by these presents.

SEALED with our seals and dated this 28th day of May, 1913.

WHEREAS, lately, in the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said Court between J. J. O'Connell, a minor, by Catherine M. O'Connell, his guardian ad litem, as plaintiffs, and the said Potlatch Lumber Company, a corporation, as defendant, [147] a judgment was rendered in favor of said plaintiffs and against said defendant for the sum of Three Thousand Five Hundred Dollars ($3,500), and costs of action, and the said Potlatch Lumber Company has obtained from said court a Writ of Error to reverse said judgment in the aforesaid action and a Citation directed to the said above-named plaintiffs citing and admonishing them to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California.

NOW, THEREFORE, the condition of the obligation is such that if the said Potlatch Lumber Company, plaintiff in error, shall prosecute its said Writ of Error to effect, and answer all damages and costs if it fails to make good its plea, then this obligation

shall be void; otherwise to remain in full force and effect.

(Signed) POTLATCH LUMBER COMPANY,
By CANNON, FERRIS & SWAN,
Its Attorneys.

(Signed) FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By W. S. McCREA,
Attorney in Fact.

(Signed) Attest: W. L. BERRY,
General Agent.

[Seal of Corporation Surety Co.]

The above and foregoing bond approved this 28 day of May, 1913.

(Signed) FRANK H. RUDKIN,
Judge. **[148]**

[Endorsements]: Due service of the within bond by receipt of a true copy thereof admitted this 28th day of May, 1913.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff.

Bond on Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. **[149]**

Original.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Citation [on Writ of Error].

United States of America,—ss.

The President of the United States to J. J. O'Connell, a Minor, by Catherine M. O'Connell, His Guardian ad Litem, and to Robertson & Miller, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein the Potlatch Lumber Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of May, A. D. one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal] FRANK H. RUDKIN,
United States District Judge. [150]

[Endorsed:] No. ——. In the U. S. District Court, Eastern District of Washington, Northern Division. J. J. O'Connell, a Minor, by Catherine M. O'Connell, His Guardian ad Litem, Plaintiff, vs. Potlatch Lumber Company, a Corporation, Defendant. Citation. Filed in the U. S. District Court, Eastern Dist. of Washington. Filed May 28, 1913. Wm. H. Hare, Clerk. By Frank C. Nash, Deputy Clerk.

Due service of within citation by receipt of a true copy thereof admitted this 28th day of May, 1913.

ROBERTSON & MILLER,
Attorneys for Plaintiff. [151]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said court, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Complaint;

Answer;

Reply;

Verdict;

Judgment;

Motion for judgment *non obstante veredicto;*

Petition for new trial;

Opinion;

Bill of exceptions; **[152—1]**

Order of September 23, 1912, extending time for preparing and filing bill of exceptions;

Order of October 31, 1912, extending time for preparing and filing bill of exceptions;

Order of December 30, 1912, extending time for preparing and filing bill of exceptions;

Order of April 5, 1913, extending time for preparing and filing bill of exceptions;

Order of April 10, 1913, staying execution;

Order of May 8, 1913, extending time for preparing and filing bill of exceptions;

Petition for writ of error;

Assignments of error;

Order allowing writ of error;
Bond on writ of error;
Citation;
Writ of error;
and any and all other records, entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsements]: Due service of within Praecipe by receipt of a true copy thereof admitted this —— day of ————, 1913.

(Signed) FRED MILLER,
Of Atty. for Plaintiff.

Praecipe for Transcript of Record. Filed in the U. S. District Court for the Eastern Dist. of Wash. Jun. 6, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy **[153]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by His Guardian ad Litem, CATHERINE M. O'CONNELL,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,
State of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, do hereby certify that the foregoing pages numbered from No. 1 to No. 153, inclusive, constitute and are a true complete and correct copy of the record, pleadings, testimony and all proceedings had in said action as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 28th day of May, 1913. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of $88.60, and that the same has been paid in full by the defendant and plaintiff in error, Potlatch Lumber Company. **[154]**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Spokane in said Eastern District of Washington, Northern Division, in the Ninth Judical Circuit, this 18th day of June, 1913, and the Independence of the United States of America, the One Hundred and Thirty-eighth.

[Seal] W. H. HARE,
Clerk of the United States District Court for the Eastern District of Washington. **[155]**

[Endorsed]: No. 2281. United States Circuit Court of Appeals for the Ninth Circuit. Potlatch Lumber Company, a Corporation, Plaintiff in Error, vs. J. J. O'Connell, a Minor, by Catherine M. O'Connell, His Guardian at Litem, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed June 23, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit

POTLATCH LUMBER COMPANY, a Corporation,

Plaintiff in Error.

vs.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, his Guardian *ad Litem*,

Defendant in Error.

No. 2281.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

EDWARD J. CANNON,
GEORGE M. FERRIS,
CHARLES E. SWAN,
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

This action was instituted by defendant in error to recover damages for personal injuries received while in the employ of plaintiff in error. The trial resulted in a verdict and judgment in favor of defendant in error for Thirty-five Hundred Dollars ($3500) and costs. There is little or no dispute about the facts surrounding this accident. The record discloses that at the time of the accident the defendant in error lacked less than one month of being eighteen years of age (88), and that prior to the accident he had always been a bright, active boy in the possession of all his faculties. That he commenced to work at the age of fourteen and worked at different kinds of labor from that time on, such as working on the section, helping to make ties, clerking in a store, working on a ranch and helping to put up ice (37). He had been employed by plaintiff in error in and about its lumber mill located at Potlatch, Idaho, for about one month prior to the accident (35), and had worked in different capacities. On the night of the accident and for several nights prior thereto (64), he had been engaged with a fellow-servant by the name of Roy Rudd in removing from flat cars any logs which remained upon the cars after the crane had been used to unload the logs from the car. It appears that in unloading the logs from the cars a cable was placed around all of the logs on

the car and the crane was then used to lift this cable, and the logs from the car and that sometimes three or four logs would slip out of this cable as the crane was lifting the logs from the car and these three or four logs would remain upon the flat car in an irregular and disorderly condition (42-72-73).

It was a dark, cold misty night when the accident happened and there was some snow and ice upon the car where the defendant in error was working (43). He testified that the lights were some 150 to 200 feet away and that he could not see very well (43). At the time of the accident defendant in error and his fellow-servant, Roy Rudd, were engaged in removing from one of the flat cars three logs, some sixteen or eighteen feet in length (68-69), which were left upon it after the great body of logs had been removed by means of the crane. These three logs were scattered upon the car in an irregular and disorderly way. The end of one of these logs extended out beyond the body of the car. The defendant in error and Roy Rudd threw one of the logs off of the car in such a way that it struck this unsupported end of the log, which was extending beyond the car, with the result that the other end swung around and struck the defendant in error, throwing him from the car and causing the injuries complained of (44-45).

With reference to how the accident occurred the defendant in error testified as follows (44-45):

"Q. Now, then, tell the jury how you came to move the logs in question?

A. We had passed by there—the foreman came back with us to the side of the car and told us to get up on the car and roll them logs off. We got up there and I stepped on the inside, the other man at the end of the log, and we were trying to get them off.

Q. Sir?

A. We began to get them off. There was small logs on the car pretty near leven with the bunks, it was awful slippery and it took us some time to get the first log started, and when it started we started to move back, and when I started to move the other log hit me across the back, knocking me on my head in the pond.

Q. How did the log that struck you, how did that happen to be moved?

A. By the end of the other log."

On cross examination the defendant in error testified as follows (73-74-75):

"Q. You were fully aware of the fact, weren't you, Mr. O'Connell, that if that log in rolling off hit the end of another that it might possibly fly around and hit somebody?

A. No, sir, I was not aware of the fact.

Q. You did not know that then?

A. No, sir, I did not.

Q. You did not know that if one body such as a log, would strike another on the end that possibly it might fly up and hit you; you did not know that?

A. No, sir, I did not.

Q. What did you think would happen if this log in falling off struck the end of another log?

A. I did not think it could fall off; that is (85-53), I thought it would roll straight off, would have been my opinion of it.

Q. You thought it would roll straight off? You did not go to the end of these logs to examine which were on top or which were underneath, did you?

A. No, sir.

Q. You could see that from where you stood right here, didn't you?

A. I was not far from the end of the logs.

Q. You were not over six or eight feet, were you?

A. Not much more.

Q. And you could see, whether this was on top or underneath, couldn't you, from where you stood?

A. That is why I could not give you a definite answer a minute ago on the length of that log, for I could not see the end of it.

Q. You mean to say from where you stood there you could not see six or eight feet?

A. You could see black, that is all, the log.

Q. You could see the black log?

A. Yes, sir, you could not see the end of it out where it stuck over the car.

Q. You could not see that it had snow underneath?

A. In some places.

Q. But you could not see from where you were standing to the end of this log six or eight feet way?

A. You could see the log. (86-54.)

Q. Could you see whether this log was on top or underneath?

A. I would not say whether it was on top, but I don't think it was underneath.

Q. As a matter of fact, you did not pay much attention, did you?

A. No, sir.

Q. You just went ahead and started to roll it off?

A. Yes, sir.

Q. And that is the way you had done with any other log that you had rolled off while you had been there?

A. Yes, sir."

Over the objections of plaintiff in error the trial court permitted defendant in error to introduce evidence to the effect that he had not been warned or instructed with reference to the dangers incident to unloading logs from the cars and that he was inexperienced in such work (48-54).

SPECIFICATIONS OF ERROR.

I.

The Court erred in permitting the defendant in error to testify over the objection of plaintiff in error that he had not been warned or instructed with reference to the dangers incident to unloading the logs from the cars (48-54), to the offer of which testimony plaintiff in error objected for the reason that failure to warn or instruct was not one of the grounds of negligence set forth and relief upon in defendent in error's complaint.

II.

The Court erred in permitting the witness Joe Loehr to testify over the objection of plaintiff in error with (137) reference to the warning or instructions which defendant in error had been given in respect to the danger incident to unloading logs from the cars (108-109), to the offer of which testimony plaintiff in error objected, for the reason that failure to warn or instruct

was not one of the grounds of negligence alleged and relied upon in defendant in error's complaint.

III.

The Court erred in refusing to grant plaintiff in error's motion to direct a verdict in its favor, made at the close of all the testimony in the case, which motion was based upon the ground that the plaintiff had failed to prove that defendant was guilty of any negligence in the premises; that the risks incident to doing the work were open and obvious, and that plaintiff therefore assumed the same. That the injury to plaintiff, if brought about by the negligence of anyone other than himself, was brought about and caused by the negligence of his fellow-servant, Roy Rudd; and for the further reason that plaintiff was guilty of contributory negligence as a matter of law, in attempting to remove the log from the car without first ascertaining in what position it was lying with reference to other logs upon the car; to which ruling defendant excepted, and the exception was allowed (110-111).

IV.

The Court erred in entering judgment upon verdict of the jury in favor of defendant in error, for the reason and upon the grounds and each and all of them, stated in (138) specification of error No. 3, to which entry of

judgment the defendant excepted and the exception was allowed (11).

ARGUMENT AND AUTHORITIES.

(SPECIFICATION OF ERRORS 3 AND ~~5.~~ 4.)

The work in which defendant in error was engaged at the time of the accident was indeed of a most simple and ordinary character. To remove three logs from an ordinary flat car with the help of another man is an operation that any person of ordinary intelligence must fully understand. That the person of the age of approximately eighteen years who had been engaged in various kinds of common labor since his fourteenth year, as testified to by the defendant in error, should not know and fully appreciate the fact that if he rolled one log off the car in such a way as to strike the unsupported end of another log, that the latter log would undoubtedly swing around in some direction and probably hit him is beyond comprehension, and yet this is the position of defendant in error. He had unloaded many other cars during the several days that he worked prior to the accident. These several logs which would remain upon the car after the crane had unloaded the great body of logs from the car must necessarily be scattered upon the car in an irregular and disorderly manner, because they consisted of the few logs which slipped out

of the cable when the crane was being used. Wherein, we ask, was the master negligent? Was it because the defendant in error was not told that if he rolled one log off the car upon another unsupported log that he might be injured? A fact, which from his age, intelligence and experience he knew and appreciated as fully as did the plaintiff in error. Every child learns this principle before he is ten years of age. It is the principle which causes the small stick or peg to fly out of the hole when struck on the unsupported end by the stick in the hands of the player when engaged in playing the old familiar game of "peg and the stick," sometimes called "peg in the hole," a game which every child plays more or less as he is growing up. It is the knowledge of this principle which causes the young boy who is just learning to swim and dive to place a large stone on the end of his self-made spring-board in order that when he walks out on the unsupported end the opposite end will not fly up and cause him to fall in the water. In other words, the danger which caused the injury to defendant in error was not a hidden or latent one, but an obvious danger, spring from simple, natural and universal laws of which he was bound to take notice.

Defendant in error cannot make a case for a jury by testifying that he did not know this fact. The trial court in denying a motion for new trial well said (23):

"Nor am I entirely satisfied that the plaintiff

> did not assume the risk. While the work in which he was engaged was dangerous it was by no means complicated. It was the duty of the plaintiff and a fellow-workman to remove from the cars such loose logs as might be left after the great body of logs had been removed by means of a crane. In the instance in question, three logs remained on the car, scattered about in an irregular and disorderly way. The end of one of these logs extended out beyond the body of the car. The plaintiff threw another log out into this unsupported end and naturally, if not inevitably, the other end swung around and precipitated him off the car and into the water. It might seem that he should have appreciated this. The laws of gravitation are amongst our earliest conceptions. We can see their effect if we cannot see the force that attracts (25) atom to atom. It seems he should have known that if he threw a log onto the end of the log hanging out over the side of the car that the other end of the log was a dangerous place to remain."

It must be conceded that had the defendant in error been an adult there could be no recovery in this case, for the reason that under well-settled principles he must be held to assume the risk as a matter of law. Does the fact that he was a minor under the facts disclosed by this record change the rule? We contend that it does not.

In Kelly vs. Barber Asphalt Co., 20 S. W. 271, the Court of Appeals of Kentucky in a case where a minor 17 years of age was injured, in speaking of the risk which a minor assumes said:

> "In performing the duties of his place, a servant is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly. If he fails to do this, the risk is his own. He is bound to use his eyes, and if he fails to do so he cannot charge the consequences upon the master; and this rule applies to minor servants."

In Cudahy Packing Company vs. Marcan, 105 Fed. 645, the Circuit Court of Appeals for the Eighth Circuit had before it the question of the risk which a minor assumes. In that case the plaintiff, a minor of seventeen years of age, was working at a machine called a "hasher" and he was standing upon a block which was placed upon the floor. In some manner the block slipped and the plaintiff had his hand caught in the machine and injured. The court held that he assumed this risk as a matter of law and in its opinion said:

> "A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care and prudence. A minor assumes the ordinary risks and dangers of his employment that he actually knows and appreciates, and those which are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care and prudence, know and appreciate them to the same extent as an adult. By entering upon and continuing in the employment he assumes these risks and dangers, and no negligence can be charged to the master, and no liability can be fastened upon him, because he fails to give notices or warnings of or

to remove these common risks of the employment. Manufacturing Co. v. Erickson, 55 Wed. 943, 946, 5 C. C. A. 341, 344, 12 U. S. App. 260, 265; Pressed Brick Co. v. Reinneiger (Ill. Sup.), 29 N. E. 1106, 1107; Dowling v. Allen, 74 Mo. 13, 16; Railway Co. v. Valirius, 56 Ind. 511, 518; Buckley v. Manufacturing Co. (N. Y. App.), 21 N. E. 717; Railway Co. v. Frawley (Ind. Sup.), 9 N. E. 595, 598; Engine Works v. Randall, 100 Ind. 293, 298, 300; Berger v. Railway Co., 39 Minn. 78, 38 N. W. 814; Sullivan v. Manufacturing Co., 113 Mass. 396; Fones v. Phillips, 39 Ark. 17, 38."

The rule as to the duty of the master to warn the servant is aptly stated in 1 Dressler's Employers' Liability, Sec. 98, as follows:

"In the absence of anything to show the contrary, the latter has a right to assume that the servant knows those facts of common experience with which ordinary persons of his age and experience are familiar—such matters as are within common observation and are according to natural law. He has also the right to assume that his servant will exercise reasonable care, under the circumstances, to inform and protect himself."

In the case of St. Louis Cordage Co. v. Miller, 126 Fed. Rep. 495, in passing upon the question of the risk which a minor assumes, the court said:

"The record in the case at bar has been searched in vain for any fact or testimony adequate to withdraw it from the principles of law established by this strong current of decision, or to distinguish it from the cases which have been cited to illustrate the rule. This plaintiff was a young woman 20

years of age. The presumption is that she was possessed of ordinary intelligence and ability. She had been at work in factories for more than a year, and in the establishment of the defendant for more than six months. She knew that the gearing which injured her had been covered before Christmas, and that it was uncovered from that time until she was injured on February 13, 1902. She had worked at this machine by the side of the exposed mashing cogs from 10 to 15 minutes every day during the six weeks that they remained uncovered. She testified that she did not know that it was dangerous to run the gearing uncovered, but she knew the action of the lever, the greasy condition of its handle, its proximity to the mashing cogs, and she could have no more failed to know and appreciate that the revolving cogs would crush her hand if she permitted it to slip between them than she could have failed to appreciate that boiling water would scald or fire would burn. *One cannot be heard to say that he does not know or appreciate a danger whose knowledge and appreciation are so unavoidable to a person of ordinary intelligence and prudence in a like situation.* King v. Morgan, 48 C. C. A. 507, 109 Fed. 446, 448; Moon Anchor Consol. Gold Mines v. Hopkins, 49 C. C. A. 347, 353, 111 Fed. 298, 304; Sullivan v. Simplex Electrical Co., 178 Mass. 35, 39, 59 N. E. 645; Buckley v. Mfg. Co., 113 N. Y. 540, 21 N. E. 717. The machinery, the cogs, the slippery lever, and their relation to each other, were open, visible, known. There was nothing recondite, imperceptible, uncertain, in the danger impending from them. It was plain and certain that if the employe permitted her hand to slip between the revolving cogs that hand would be injured. The defect of the ungnarded gearing was obvious, the danger from it was apparent, and, without a disregard of the rules to which we have adverted and the decisions of the Supreme Court

> and of other courts of the country to which reference has been made, there is no escape from the conclusion that the evidence in this case established without contradiction or dispute the facts that the plaintiff, by continuing in her employment without complaint, in the presence of an obvious and open defect and of a plain and apparent danger, assumed the risk of the injury which she sustained, so that she never had any cause of action against the defendant; and the court below should have so instructed the jury. The judgment below is accordingly reversed, and the case is remanded to the Circuit Court for a new trial."

In Hesse v. National Casket Co., 52 Atl. 384, the plaintiff, a boy of sixteen years of age, was injured while working with a circular saw. Plaintiff had only been at work at the machine five days when he was injured, his injury being caused by the bench upon which he was working tipping over, thereby causing him to lose his balance, causing him to fall towards the saw, thereby bringing his hand in contact with the saw.

In holding that the plaintiff assumed the risk, in the course of its opinion the court said:

> "If the accident resulted from the plaintiff having of his own volition moved too near the end of the bench, the master is equally relieved from responsibility. The fact that the bench would tip over if a person standing upon it should move beyond its center of gravity, was perfectly obvious, and the plaintiff, although a minor, was chargeable with notice of that fact. He was old enough to fully appreciate the danger of having the bench tip,

> as well as the likelihood of its tipping if he stood too near to one or the other of its ends, and consequently took these risks upon himself, to the same extent as a person of more mature age. Dunn v. McNamee, 59 N. J. Law, 498, 37 Atl. 61."

In Carriere v. R. McWilliams, Limited, 29 South. 333, the Supreme Court of Louisiana announces the following rule with reference to minors:

> "The employe, who is 18 years of age, has not, on that account alone, a greater right to recover damages for an injury than one of age. He was old enough, and had had experience enough, to judge of the danger for himself."

In Bohn Manuf'g. Co. v. Erickson, 55 Fed. 946, in passing upon the duty of the master to warn, and the risks which a minor assumes, the court said:

> "SANBORN, Circuit Judge (after stating the facts): It is the general rule that a servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care. He does not assume latent dangers known to the master that are actually unknown to him, and that one of his capacity and experience would not have known by the use of ordinary care. It is the duty of the master to notify the servant of such dangers. Obviously the line between dangers apparent and latent varies with the varying experience and capacity of the servants employed. Risks and dangers that are apparent to the man of long experience, and of a high order of intelligence, may be unknown to the

inexperienced and ignorant; hence, if the youth, inexperience, and incapacity of a minor who is employed in a hazardous occupation are such that a master of ordinary intelligence and prudence would know that he is not aware of or does not appreciate the ordinary risks of his employment, it is his duty to notify him of them, and instruct him how to avoid them. This notice and instruction should be graduated to the age, intelligence, and experience of the servant. They should be such as a master of ordinary prudence and sagacity would give under like circumstances, for the purpose of enabling the minor not only to know the dangerous nature of his work, but also to understand and appreciate its risks and avoid its dangers. *They should be governed, after all, more by the experience and capacity of the servant than by his age, because the intelligence and experience of men measure their knowledge and appreciation of the dangers about them far more accurately than their years.* Pressed Brick Co. v. Reinneiger (Ill. Sup.), 29 N. E. Rep. 1106, 1107; Dowling v. Allen, 74 Mo. 13, 16; Railway Co. v. Valirius, 56 Ind. 511, 518; Buckley v. Gutta Percha Co. (N. Y. App.), 21 N. E. Rep. 717; Railway Co. v. Frawley (Ind. Sup.), 9 N. E. Rep. 595, 598. On the other hand, no duty rests upon the master to notify the minor of the ordinary dangers of his occupation that are so open and apparent that one of his age, experience, and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate them. No duty rests upon him to notify the minor of the ordinary dangers of his employment that the latter actually knows and appreciates. As to these dangers and risks that he actually knows and appreciates, and as to those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them, the minor is governed by the same rules as the adult. He assumes

these risks by entering upon or continuing in the employment, and no negligence can be charged to the master, and liability can be fastened upon him, because he fails to give futile notices and warnings of these dangers, which the minor knows and appreciates, or ought to know and appreciate. Engine Works v. Randall, 100 Ind. 293, 298, 300; Berger v. Railway Co., 39 Minn. 78, 38 N. W. Rep. 814; Sullivan vfl Manufacturing Co., 113 Mass. 396; Fones v. Phillips, 39 Ark. 17, 38. Thus, if a master ememploys a boy of ordinary intelligence, 15 years of age, to work upon the roof of a building, and he steps off and falls to the ground, the master can not be charged with negligence because he did not notify him that his body would be forcibly drawn to the earth if he stepped out into space. If a blacksmith employs such a boy to assist him about his forge, and he places his hand in the fire and burns it, the master is not chargeable with negligence because he did not notify the boy that the fire would burn his flesh. These dangers are patent, and no boy 15 years of age, of ordinary capacity, would fail to appreciate them. And if, in the case at bar, the plaintiff, after entering upon his work at the relishing machine weeks before, after repeatedly seeing the revolving knives cut the wooden rails, permitted his hand or his coat to come under those knives, uninfluenced by the latent danger from the suction of which he was not aware, the defendant cannot be charged with negligence, and made liable here, because it did not notify him that those knives would cut his fingers, and tear and draw his clothes, if he placed them within their reach. These dangers were apparent. A boy of his age and intelligence, with the experience he had after working in that factory four months, and at this machine at frequent intervals for several weeks, must have known and appreciated them."

In the case at bar we contend that the age, intelligence

and experience of the defendant in error was such that it was wholly unnecessary for the master to inform him that if he should roll one log upon the unsupported end of another log that the latter would probably swing around and hit him, because this risk was open and obvious and a person of ordinary prudence, of the age and capacity of the defendant in error, must be charged with full knowledge of this fact as a matter of law. There was nothing complicated about the work in which defendant in error was engaged. It cannot be contended that it was a hazardous employment. There was no complicated machinery being used, and it is nowhere alleged in the complaint that the master failed to warn the defendant in error of any danger or that there was any hidden danger in connection with the work of which the defendant in error was not fully informed.

In the case of Federal Lead Co. v. Swyers, 161 Fed. 687, the court announced the following rule, with reference to the risk which a minor assumed:

> "Where a servant was between 19 and 20 years old, sound in body and mind at the time he was injured, and possessed of the knowledge and experience of an adult, he was chargeable with the consequences of such knowledge, and the fact that he was under 21 years of age was not material in determining whether he assumed the risk of the dangers he involuntarily encountered in the operation of defendant's machinery."

In the case of Utah Consol. Mining Co. v. Bateman, 176 Fed. 57, at p. 63, the court, in passing upon risk which the servant assumes, said:

> "While it is the duty of the master to exercise ordinary care to provide a reasonably safe place for the servant to work, and reasonably safe appliances for him to use, and while, unless he knows, or the fact is obvious, that this duty has not been discharged by the master, he may assume that it has been, and may recover for any injury resulting from the master's failure to discharge it, yet he assumes all the ordinary risks and dangers of the employment upon which he enters and in which he continues, including those resulting from the negligence of his master which are known to and appreciated by him, and those which would have been known to and have been appreciated by a person of ordinary prudence and care in his situation. *Nor can a servant be heard to say that he did not appreciate or realize the danger when the defect or negligence was obvious and the dangers would have been apparent to an ordinarily prudent person of his intelligence in his situation.* St. Louis Cordage Co. v. Miller, 126 Fed. 495, 501, 509, 511, 61 C. C. A. 477, 483, 491, 493, 63 L. R. A. 551; Glenmont Lumber Co. v. Roy, 126 Fed. 524, 528, 61 C. C. A. 506, 510; Lamson v. American Ax & Tool Co., 177 Mass. 144, 145, 58 N. E. 585, 83 Am. St. Rep. 267; Sullivan v. Simplex Electrical Co., 178 Mass. 35, 39, 59 N. E. 645; Chicago, Milwaukee & St. Paul Ry. Co. v. Benton, 132 Fed. 460, 462, 65 C. C. A. 660, 662; Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64, 67, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; Chicago, Great Western Ry. Co. v. Crotty, 141 Fed. 913, 915, 73 C. C. A. 147, 149, 4 L. R. A. (N. S.) 832; Burke v. Union Coal & Coke Co., 157 Fed. 178, 180."

In the case of Slady v. Marinette Lumber Co., 83 N. W. 514, the plaintiff was injured while employed by the defendant rolling logs through a trough on iron skids and down these skids to a saw.

In holding that the plaintiff because of his age and experience had full knowledge of the danger incident to the doing of the work in question, the Supreme Court of Wisconsin, said:

> "With his age and experience, it is idle to say that the plaintiff did not know that, when logs were thrown by the eccentric from the log trough onto the log deck, they would roll down on the skids, at least to the first drop mentioned, and that, if they were started down the skids from such first drop, they would roll down, at least to the second drop, where the skids descended back towards the trough, with the liability of going to the end of the skids and against the carriage, if it was there, and over the end of the skids into the path of the carriage, if it was not there. Such would necessarily be the result from the condition of the skids and the force of gravity. The condition of the skids was open and obvious to the plaintiff, and such as he was bound to recognize, as well as the force of gravity. There was nothing obscure, uncertain, or complex in the situation. As found by the trial court, it appears from the uncontradicted evidence that the defendant's log deck, with its appliances, was substantially the same as those in common use. Such being the conditions, we must hold, as a matter of law, that the plaintiff assumed the risk. See cases cited in Helmke v. Thilmany (decided herewith), 83 N. W. 360, and Renne v. Leather Co., Id. 473."

In the case of Helmke v. Thilmany, 83 N. W. 360, the

plaintiff was a minor, sixteen years of age, and was injured by being caught in the machine at which he was working.

In holding that the minor assumed the risk, the court said:

> "Here, the plaintiff, while putting his coat on, unnecessarily backed up against the gearing, which he admits he knew to be dangerous. This court has repeatedly held that the true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he in fact knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger. Luebke v. Machine Works, 88 Wis. 442, 60 N. W. 711; Craven v. Smith, 89 Wis. 121, 61 N. W. 317; Casey v. Railway Co., 90 Wis. 113, 62 N. W. 624; Herold v. Pfister, 92 Wis. 417, 66 N. W. 355; Klatt v. Lumber Co., 92 Wis. 622, 627, 66 N. W. 791; Roth v. Manufacturing Co., 96 Wis. 615, 71 N. W. 1034; Larson v. Knapp, Sout & Co., 98 Wis. 178, 73 N. W. 992. It has also been repeatedly held that where it appears from the undisputed evidence that the defect or danger is open and obvious, and such as under the circumstances ought to have been known and comprehended by the plaintiff, that he will be held to have assumed the risk as a matter of law. Id. Such appears to be the case at bar, and hence the trial court correctly held that the plaintiff assumed the risk. The judgment of the circuit court is affirmed."

In the case of Dahlke v. Illinois Steel Co., 76 N. W. 362, with reference to the risk which an employe assumed, the court said:

"The duty to instruct does not go so far as to require the master to acquaint the employe with every possible danger to which he may be subjected in the course of his employment. The master has a right to assume that the servant will see and appreciate those dangers which are open and obvious to a person of ordinary comprehension; also that other servants associated with him in the common employment will exercise ordinary care and prudence; also that tools which are furnished will not be so used as to be unreasonably or unusually dangerous, or that a place which is reasonably safe will be made unsafe by the improper conduct of those who are required to work there, or their fellow servants; and as to all such matters the employe assumes the dangers as a part of his contract of employment. Such contract, by implication, includes an assumption of all the ordinary risks incident to the employment, such as the risk of a co-employe's failing to exercise ordinary care and prudence."

In the case of Indianapolis Terra Cotta Co. v. Wachestetter, 88 N. E. 853, the court in its opinion said:

"If a master sends his servant to do work in a place which the master knows to be dangerous, it is his duty to warn the servant of the danger to be apprehended, no matter how the dangerous condition originated, whether from the act or omission of the master, the act or omission of a fellow servant, or from purely accidental causes; but this rule thus broadly stated can apply only to such dangers as are actually known to the master. If such dangers are of a character that inhere to the place furnished the servant to work in, or to the things furnished the servant to work with, then it is the duty of the master to exercise ordinary care to know of their existence, and guard his servant from them; and even though he does not, in fact,

know of them, if he could, by the exercise of such care, have ascertained them, then he would be chargeable with knowledge of their existence. But if the dangers arose, not from any act or omission of the master, not from a danger inherent in the place, or with the tools and implements and machinery furnished him to work with, *but from the manner in which the servants performed their duty to the master, a transitory peril occasioned by the execution of the work, then the master is not chargeable with notice of such peril, or bound to exercise care to ascertain it, and is charged with no duty to warn his servants against it, unless he have actual knowledge of the existence of the danger at the time.* Southern Ind. Ry. Co. v. Harrell, 161 Ind. 699, 68 N. E. 262, 63 L. R. A. 460; Whittaker v. Burk, 167 Mass. 598, 46 N. E. 121; Meehan v. Speirs, 172 Mass. 375, 52 N. E. 518; Howard v. Railway Company (C. C. A.), 26 Fed. 837; St. Louis etc. v. Needham, *supra;* Chicago etc. v. Barker, *supra;* Hodges v. Standard Wheel Co., 152 Ind. 680, 52 N. E. 391, 54 N. E. 383. Here the evidence shows that the danger to be apprehended from the rick of plaster of paris falling was clearly a transitory one, occasioned by the manner in which the appellant's fellow servants piled up the sacks of plaster, and that the danger arose from the work of the servants, and not from any act of omission or commission of the master. The removal of the plaster from the car, the stacking of the sacks in the plaster room, and the work of subsequently taking the sacks from this store and emptying them into the bins for use, were minor details of the work in which appellants and its servants were engaged; and the supervision of these minor details of its business appellant insists was a delegable duty. Whether or not it was or was not we think cannot affect the result."

We contend that the manner of performing the work in this case adopted by the defendant in error and his fellow servant Rudd was the proximate cause of the accident, and that the accident was not due to any negligence whatever on the part of the plaintiff in error.

In Ryan v. Armour, 47 N. E. 60, the plaintiff, a minor of the age of 19 years, was injured while employed by the defendant in hanging hog tongues in a cooling room. It was alleged in the complaint that plaintiff was a youth of tender years, and that he was hired as a common laborer, and that hanging tongues on hooks was a hazardous occupation, for which he did not have the requisite skill, knowledge or experience. The negligence complained of was that the defendant set him to work at hanging tongues, without giving him any warning or instruction about the dangers of the employment, and in not sufficiently lighting the cooling room, and allowing the hook upon which he struck his hand to be turned in such a way that he was injured.

In passing upon the case, the court said:

> "Plaintiff testified that he was injured in the latter part of July, 1890, about the 23d, and that he was 19 years old on October 13th, following. His evidence therefore contradicted his averment that he was of tender years, and incapable of intelligently appreciating the nature and hazards of the employment. He had passed beyond the stage of thoughless childhood, and was not the subject of

especial care by his employers on account of his age. He testified that he was hired generally to do and did whatever the foreman directed. There was nothing said about the rate of wages, but he was paid $1.50 a day. His employment began in May, 1890, and he worked most of the time for two months attending the door to the chill room as the men went in and out with the trucks. During that time he also did some other work, cleaning up the floors. At this time, in the latter part of July, he was sent to assist in hanging tongues. The evidence did not establish that this work belonged to a class fairly denominated hazardous or dangerous, as alleged in the declaration. Almost all kinds of work require some degree of care and observation on the part of the workman, but this operation of hanging up hogs' tongues is about as simple as any of the common avocations in which unskilled labor is employed. Besides, whatever of danger there was about it was not hidden, but was open and obvious. Plaintiff could see the hooks as well as anybody, and he worked with them, hanging up fresh tongues and taking off cold ones, all of one day, and the next day until 4 o'clock, before the accident happened. He had ample opportunity to learn all that could have been explained to him respecting the hazards attending the employment. The evidence did not prove any negligence on the part of defendants in setting him to work at hanging the tongues, or in failing to warn him that he was about to engage in a hazardous occupation, or to point out perils to which he was exposed. The cooling room was very large, and there were some gas jets in other parts of it, but in the corner where the tongues were hung the light furnished was by large kerosene lamp, that could be moved from place to place. The room was kept at a temperature of 38 to 40. There were no windows, and it was not practicable to have many lights, on account

of the heat from them. The kerosene lamp would grow dim, from smoke and moisture, by evening, so as not to give as clear a light as in the morning. But there was an entire failure of evidence that the condition of the room with respect to light contributed in any way to the injury. There was no proof that the light was not sufficient to clearly distinguish the hook, or that plaintiff struck it from inability to see it. A hook would sometimes get turned at an angle of about 45°, and this brought it half an inch nearer to the one on which plaintiff hung the tongue. In order to recover on account of this condition, it was necessary for plaintiff to prove a want of proper care and supervision by defendants, permitting the existence and continuance of such condition, or permitting a general unsafe condition of the hooks, and upon this question there was also a failure of proof. There was no evidence when the hook was turned, or of any fault in regard to it, or of any general unsuitable or insecure condition of the hooks as a whole. Under such circumstances, the fact of the hook being turned at the time of the accident was no evidence of a want of reasonable care on the part of the defendants with respect to the appliances, and the injury to plaintiff must be classed as an accident occurring unexpectedly, without the fault of any person, and not creating any liability. We think the court was right in giving the instructions directing the verdict, and the judgment of the appellate court will be affirmed. Affirmed."

In Lowcock v. Franklin Paper Co., 47 N. E. 1000, the plaintiff, a minor of the age of fifteen years, was injured and alleged that the master failed to instruct him as to the danger incident to doing the work. In deciding the case, the court held that plaintiff assumed the risk, and in its opinion said:

> "We perceive no sufficient distinction between this case and others which have been decided, and are of the opinion that it should have been taken from the jury. Under the circumstances described, whatever his testimony, an intelligent boy of 15 must be assumed to have known the danger of his hand being drawn in and brought in contact with the hot, inward-revolving roll. Crowley v. Pacific Mills, 148 Mass. 228, 18 N. E. 344; Connelly v. Eldredge, 160 Mass. 5666, 36 N. E. 469. It is suggested that the felt was soft and flexible when at rest, and that the plaintiff may not have appreciated how it would act. But in Stuart v. Railway Co., 163 Mass. 391, 40 N. E. 180, the plaintiff was held chargeable with knowledge of the danger of his hand being pulled in by hay which he was holding,—a stronger case than the present."

In Wagner v. Plano Mfg. Co., 85 N. W. 643, plaintiff, minor of the age of 15 years, was injured while trying to adjust a binder, and it was alleged that plaintiff's injury was caused by the negligence of the defendant in failing to warn plaintiff of the dangers of machines falling over.

The court held that the danger was so open and obvious that he assumed the risk as a matter of law, and there was no obligation on the part of the defendant to warn of the dangers. In its opinion, the court said:

> "The question to be decided, therefore, is simply whether the danger of the machine falling over was such a danger as called for a warning on the part of Diebler before he set the plaintiff at work. Upon this question, it seems to us that the answer must

clearly be in the negative. The placing of a binder upon its trucks is an operation of a singular character to many operations which are continuously going on upon a farm, and in which boys of the plaintiff's age are frequently called upon to assist. The danger of the machine turning over, if not properly blocked up, was patent to a boy of this age as well as to a man. There is, of course, danger in any operation involving the lifting and moving of heavy articles which may lose their equilibrium, but this danger is one within the common knowledge of boys as well as men. It would not be reasonable to hold that a boy must be warned that a heavy article may fall and hurt him, if not properly supported, every time he is asked to assist in moving it. Warning is not required against abvious dangers in ordinary operations which are matters of common knowledge to all. Bailey, Pers. Inj., §2730. The boy received an unfortunate and serious injury, but we are unable to see that the defendant is responsible for it upon any principle of law. Judgment affirmed."

In American Bridge Co. v. Seeds, 144 Fed. 605, the court quoted with approval the following rule from Deye v. Lodge & Co. (C. C. A.), 137 Fed. 480, with reference to the duty of the master to furnish a safe place for his workmen:

"The master's obligation to supply a safe place for his work to be done and to keep it safe does not impose the duty of always keeping it in a safe condition, so far as its safety depends upon the proper performance of the very work which his servants have there undertaken to do. *If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation.*"

In this case the place which was furnished the defendant in error to work on was safe, and the negligent manner in which he and his fellow-servant attempted to do the work made the place unsafe, and this, under the authority last quoted, was one of the risks which he assumed.

In Whalen v. Rosnosky, 81 N. E. 282, the plaintiff, a boy of the age of seventeen years, was injured in opening wooden boxes, by reason of a piece of steel flying off the hatchet which he was using, and injuring his eye. He had been given no warning of the danger, and, in holding that the plaintiff could not recover, the court said:

> "There is nothing to show negligence on the part of the defendant. The tools furnished were proper. The thing he was told to do was one of the common operations of every-day life, free from complexity or complication and it was done in the usual way. Universal experience has stamped it as ordinarily a harmless act. Under the circumstances there was no duty resting on the employer to warn the employee."

In the case of Hardy v. Chicago, R. I. & P. Ry. Co., 115 N. W. 8, in passing upon the duty of the master to warn and instruct, the court said:

> "Stated generally, the duty of a master to warn and instruct his employe, arises when the existence of the danger is, or should be, in the exercise of reasonable care, known to him, and the existence of

such danger is either unknown to them, or is not discoverable by them, in the exercise of reasonable care, or when the danger is such in character as not to be properly appreciated by them by reason of their lack of experience, their youth, or general incompetency or ignorance. 4 Thompson on Negligence, §4055. In taking an adult servant into his employ in a particular capacity, the master has the right, generally speaking, to presume competency on the part of such servant, and that he appreciates the dangers ordinarily incident to the work he undertakes to do. Of course, if the master knows, or has reason to believe, that the servant is ignorant, the duty to warn and instruct exists. Yeager v. Railway, 93 Iowa, 5, 61 N. W. 215; McCarthy v. Mulgrew, 107 Iowa, 76, 77 N. W. 527. It has never been considered, however, that the duty to warn and instruct exists to those dangers incident to a particular employment which are obvious. And, having regard for the character of the employment, an obvious danger is one that is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety. Newbery v. Mfg. Co., 100 Iowa, 451, 69 N. W. 743, 62 Am. St. Rep. 582; Hanson v. Hammell, 107 Iowa, 171, 77 N. W. 839. * * * 'The master is under no duty of warning or instructing a servant as to dangers which are discoverable by the exercise of ordinary care on his part, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing that he possesses.' 4 Thompson on Negligence, §4063."

In Mississippi River Logging Co. v. Schneider, 74 Fed. 195, in passing upon the duty of the master to warn as to dangers which are obvious, the court said:

"Nor can it be said that the danger was a con-

> cealed one, growing out of any defective machinery. It arose from the manner of operation, not because of defective machinery, and therefore was a risk incident to the business. *It is not necessary that a servant should be warned of every possible manner in which injury may occur. He must examine his surroundings, and take notice of obvious dangers and the operation of familiar laws.* It is sufficient, if he, being ignorant, be warned of the dangerous nature of the employment, and how safely to operate a dangerous appliance. Here the injury arose, not from the manner of the operation of the slab saw, but the manner in which other operatives performed or failed to perfor mtheir duties. The danger arising from such failure was necessarily incident to the employment. The servant cannot justly demand that he shall be warned against risks that are as obvious to him as to the master. Kohn v. McNulta, 147 U. S. 238; 241, 13 Sup. Ct. 298; Southern Pacific Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530."

In United States Cement Co. v. Koch, 85 N. E. 490, the Supreme Court of Indiana, in passing upon the liability of the master where the danger arises only as the work progresses, used the following language:

> "The place furnished by the master was safe until by the operation of the plant it was rendered dangerous, and, to keep it safe, it was essential that the coal dust should be kept cleaned up off the floor of the trench and pit, and this is the thing it is charged the master neglected to do. When the place furnished by the master to the servant in which to work is safe as it stands when the work begins, and the danger can only arise as the work progresses, and is caused by the work done, it is not the duty of the employer to stand by during the progress of the work to see when the danger arises. It is sufficient if he provides

against such dangers as may possibly arise, and gives the workmen the means of protecting themselves. Durst v. Carnegie, etc. Co., 173 Pa. 162, 33 Atl. 1102; Cleveland, etc. v. Brown, 73 Fed. 970, 20 C. C. A. 147; Baird v. Reilly, 92 Fed. 884, 35 C. C. A. 78; O'Connell v. Clark, 22 App. Div. 466, 48 N. Y. Supp. 74; Petaja v. Aurora, etc., 106 Mich. 463, 64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505; St. Louis, etc. v. Needham, 67 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; 2 Labatt's Master & Servant, § 558. It cannot reasonably be claimed that it was the duty of the president and directors of this company, or its general officers, to go into this trench, with scoop and broom, and clean up the coal dust as it settled there from the operation of the plant. This was work which would necessarily be done by some employe of the company."

In Anderson v. Columbia Improvement Co., 41 Wash. 83, plaintiff, a minor, was injured by being struck by a tree which fell against another tree and broke off a limb, which fell upon plaintiff and injured him. No instructions had been given to the plaintiff as to the dangers connected with the work. The Supreme Court of Washington in that case held that plaintiff assumed the risk as a matter of law, and in its opinion said:

"There can be no doubt but that this rule is correct, but it has no application to the facts in this case. There were no abnormal or extraordinary risks or dangers about the work which the appellant was doing which were not as open and comprehensible to appellant as to respondents. While the servant was a foreigner, unable to speak the English language, and while he had no previous experience in cutting down trees the size of the one which

caused the injury, he was a young man about twenty years of age, possessed of at least ordinary intelligence, and a fair education which he received in the old country, and he must have known that, when he cut down a tree one hundred and thirty feet long and one foot in diameter at the base, it might fall upon him, and that such tree was liable to break limbs in its descent against other trees standing near by, and that these limbs would injure him if he stood under them. Under such surruundings, he must appreciate the dangers without being specially informed thereof. 4 Thompson, Commentaries on Law of Negligence, § 4061. *Such dangers are necessarily incident to his employment. They are open and obvious to ordinary inspection. They are made by the progress of the work, and the master is not required to stand by and inform him of the things which he may see by merely glancing, or using only ordinary care for his own safety. The injury in this case clearly resulted from one of the ordinary and open risks of his employment. He therefore assumed the risk, and the master is not liable.*''

In the case of Berger v. St. Paul, M. M. Ry. Co., 38 N. W. 814, the plaintiff was 19 years of age, and was injured, it was claimed, by reason of the negligence of the defendant in not properly instructing him as to the dangers. The court held that there could be no recovery, and in its opinion said:

''The pieces of smoke-stack which plaintiff was running through the machine were full of rivets or rivet holes, and the edges were in places turned up, making what are designated spurs or sharp projections. If the pieces were handled with the bare hands, these spurs would cut and scratch them, so it was usual to wear gloves as a protection to the

hands. Of course, the spurs would catch the glove, as they would the naked hand. This made it necessary to take care that the glove was not caught by a spur so near the rollers that the hand would be drawn in. No skill nor experience beyond what plaintiff had was needed to know this and to exercise such care. It was not negligence to set him at work, all of the dangers of which he knew as well as any skilled mechanic could know; nor to omit to inform him of what his senses had every day informed him. So long as a master is held liable to his servant only for negligence, no case like this can justify a recovery. Order reversed."

In Hickey v. Taafe, 12 N. E. 286, the Supreme Court of New York, in passing upon the question of duty to instruct, said:

"It is conclusively shown from her own evidence, already quoted, that she was aware of, and fully appreciated and understood, the dangers to be apprehended from working the machine; and it is equally clear, and from the same source of information, that she was perfectly competent to discharge this duty of feeding the machine long before the accident occurred. She had not, it is true, received any instructions as to its dangers from the defendant or his agents, as she says, but she had acquired the information, in fact, from the best of all teachers, practical experience. She knew, therefore, all that the instructions of the defendant would have imparted to her. This was enough. Being of age to appreciate, and having full knowledge of, the danger, and at the same time being competent to perform the duty demanded from her, *the fact that she was a minor does not alter the general rule of law upon the subject of employees taking upon themselves the risks which are patent and incident to the employ-*

ment. De Graff v. New York Cent. etc. R. Co., 76 N. Y. 125; Coombs v. New edford Co., 102 Mass. 572 at 585; Sullivan v. Indian Cordage Manuf'g. Co., 113 Mass. 396-398; King v. Boston & W. R. Co., 9 Cush. 112."

In the case of Buckley v. Gutta-Percha & Rubber Manuf'g. Co., 21 N. E. 717, the court said:

> "It is impossible to perceive from the evidence what the defendant could have done to avoid the accident. The machine was not imminently dangerous. The hands of the plaintiff, in doing anything which he had to do or was doing about the machine, would not come within nine inches of the cogs where he was injured. It was not needful to instruct him that the cogs were dangerous, because that was obvious. He could see as well as anybody that if his fingers got into the cogs they would be crushed to pieces. He was not injured because he did not know that the cogs were dangerous, but the injury happened because he slipped and fell, and instinctively threw out his hand to recover himself. His falling was a mere accident, and no amount of instruction or caution from the agents of the defendant would have prevented the accident, and saved him from the injury. His injury did not come from any ignorance of the machines, or of the danger to which he was exposed, but it came solely from the accident."

We contend that under the foregoing authorities the defendant in error must be held to assume the risk incident to unloading the logs from the car as a matter of law, and that any danger incident to performing this work was so open and obvious that a person of defendant in error's age, capacity and intelligence must be held

to have full knowledge of the same. The accident was not due to any negligence on the part of the plaintiff in error but was due to the manner in which the defendant in error, and his fellow-servant, threw the log off of the car and this was one of the ordinary risks incident to the work which the defendant in error assumed. They were furnished with a cant-hook and a peavy for the purpose of moving these logs (66-67) and all that was necessary in order to have avoided this accident was for these two men to move the unsupported end of this log out of the way. This was a mere detail of the work. Defendant in error was injured because of the manner that he and his fellow-servant attempted to unload these logs and not because of any negligence on the part of plaintiff in error.

(SPECIFICATION OF ERRORS 1 AND 2.)

The negligence complained of in this case as set forth in the complaint is found in paragraphs 3 and 4 (2 and 3) and consists in the following allegations:

> "* * * that the night was dark and the place was unlighted, except from an electric light a long distance away, so that plaintiff was unable to see or know the position of the remaining logs upon the cars and was ordered and directed by the employee in charge of said unloading to get upon the car with a peevy and roll the said logs from said car. That while plaintiff was attempting to roll said logs from said car, and not knowing of any danger in so doing

> and being unable, because of the darkness, to see the position of said logs, one thereof rolled upon the end of another which projected over the side of the car, causing the other end thereof to tip up with great force, striking the plaintiff * * *"
>
> "That plaintiff at the time of the happening of said accident was of the age of 17 years and inexperienced in this character of work, and entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation."

Nowhere in the complaint is there any allegation that the plaintiff in error *failed to warn* the defendant in error of any danger in connection with doing the work, neither is it alleged anywhere in the complaint that the plaintiff in error had any knowledge whatever of the *inexperience of the defendant in error.*

Upon the trial of the case, the defendant in error over the objection of the plaintiff in error was permitted to introduce testimony to the effect that the plaintiff in error had failed to warn him of the dangers incident to performing the work and of his inexperience (48-49-50-51-52-53-54-108). That the trial court was of the opinion that this testimony was inadmissible under the allegation of the complaint is shown by his statement appearing on page 50 of the record as follows:

> "The COURT. In a case of this kind, if I remember the rule correctly, negligence consists of two elements—one of putting an inexperienced boy to work in a dangerous place, and the other a failure to warn

him against the danger. The pleading here charges one but not the other.

"The COURT. I am inclined to allow the amendment. I am inclined to think it is necessary, but I am not certain, and the other question I will determine afterwards, as to whether or not you will be forced to go to trial. I will allow you to consult with your witnesses, if you desire."

and again on page 51:

"The COURT. The other objection, of course, goes to the legal sufficiency of the complaint, and I presume we had better determine that question first. I may be in error as to the rule. The rule is, as I stated a while ago, where an inexperienced person is placed to work in a dangerous place two elements go to make up the negligence; first, the fact of his inexperience, and second, the failure to instruct or warn. *I think the failure to instruct or warn is a necessary element of your case. If so, of course, it would be necessary to allege it.* If you have any authorities to the contrary, I will hear from you."

And again on page 25:

"The COURT. I was simply keeping on the safe side, Mr. Robertson. If the person who employed this man and the foreman was there at the time was present in court, I do not see why there should be any prejudice in allowing the amendment."

On page 111 of the record the court finally passed upon the question of the admissibility of this testimony under the allegations contained in the complaint, as follows:

"Mr. FERRIS. There is one matter that your

Honor has not ruled on, as I understand it, and that is some testimony about this warning.

"The COURT. You preserved your exception. Counsel seems willing to rest on his complaint, and I will determine that question later.

"Mr. FERRIS. Very well, with that understanding.

"The COURT. *As a matter of precaution, if I was acting for the plaintiff I would amend my complaint, but if you want to stand on it, you can.*

Mr. CAIN. I think that was Mr. Robertson's intention, but *I understand the Court can treat the complaint as amended.* (132-100).

The COURT. *No, the case will have to stand on the complaint as it exists. The testimony went in under objection. I do not want you to go into the case with any misunderstanding. I expressly stated at the time that I would admit the testimony under the objection, and if you made application to amend I would determine then whether the amendment should be allowed and what condition it should be allowed under and not otherwise.*

Mr. CAIN. I do not know whether Mr. Robertson is laboring under a misapprehension about it or not. I would like to see him a moment.

The COURT. Counsel on the other side, you will remember, stated what he expected to prove by this absent witness."

It clearly appears from what was said by the trial court that he was of the opinion that defendant in error should ask leave to amend his complaint in order to make the

testimony with reference to warning admissible, but that the defendant in error refused to do as indicated by the trial court *for the reason that they did not desire the plaintiff in error to have a continuance because of the issue which they were not prepared to meet.* The court, in its opinion denying the motion for new trial, expressly held that the failure to warn was not alleged in the complaint and could not be inferred from any allegation contained therein. In this connection the court said (21):

> "The Court is by no means satisfied with the correctness of its ruling at the trial, admitting testimony tending to show that the defendant failed to warn the plaintiff of the dangers incident to the particular employment in which he was engaged, at the time of receiving the injuries complained of. If a right of action exists in this case at all, it arises out of the fact that the plaintiff was inexperienced; that the defendant had knowledge of his inexperience, or should have had such knowledge by the exercise of reasonable diligence on its part, and that with such knowledge or means of knowledge it placed the plaintiff at work in a dangerous place without warning him against the dangers which beset him. To present such (23) an issue it must be conceded that the complaint is very loosely and very inartificially drawn. The sole allegation of negligence is contained in its fourth paragraph, which reads as follows:
>
> 'That plaintiff at the time of the happening of said accident was of the age of 17 years and inexperienced in this character of work and entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation.'
>
> True, it is alleged in the third paragraph that the

night was dark and the place unlighted, except by one electric light a long distance away; and in the fifth paragraph, that by reason of the negligence and carelessness of the defendant in causing the injuries to the plaintiff he was damaged, etc., but I apprehend the former allegation was inserted simply for the purpose of describing the conditions surrounding the plaintiff at the time of the injury, and the latter is a mere legal conclusion from the other facts set forth in the complaint. If it be urged at this time that the want of light was an independent ground of negligence I presume it will be conceded that the absence of light, at least, was open and apparent, even to an inexperienced youth of seventeen years. By a liberal and forced construction it might be inferred from the averment in the fourth paragraph 'that the plaintiff entered the employ of the defendant with the understanding that he was to be engaged in a less hazard ous occupation,' that the defendant had knowledge of his inexperience, *but a failure to warn cannot be spelled out of the complaint by the most latitudinarian rule of construction.*''

The question here presented as to the admissibility of this testimony has been passed on by the courts in the following cases:

In the case of Indiana Mfg. Co. v. Wells, 68 N. E. 319, the plaintiff was a minor of the age of 15 years, and alleged in his complaint that he was inexperienced in mechanical labor, and construction and operation of machinery, and incompetent to judge of the dangers incident thereto, which appellant knew, but the complaint failed to allege that the defendant was negligent in failing to instruct the plaintiff of the danger of working with the

machine in question. In passing upon the case, the court said:

> *"The pleading contains no charge of negligence in failing to instruct appellee how to operate the machine and avoid danger. The averments that appellee was* 15 *years old, inexperienced in mechanical labor, and incapable and incompetent to judge of the danger incident to the operation of such machinery, do not supply the place of an averment of negligent failure to instruct appellee in the use of the machinery.* The presumption that appellant did its duty, and did instruct him, is of equal weight with the presumption that it did not instruct him. From the facts averred, the inference does not necessarily follow that appellant negligently failed to instruct appellee. *The pleading does not present any issue of negligence because of failure of appellant to instruct appellee in the use of the machinery."*

In Louisville & N. R. Co. v. Wilson, 50 So. 188, the Supreme Court of Alabama had before it a question similar with the one here involved.

In that case it was alleged that the defendant negligently failed to properly and sufficiently warn or instruct the plaintiff of the danger in connection with the work; that he was a youth, and inexperienced, and, therefore, it was dangerous for him to work at all with the machine, without proper or sufficient warning as to the danger thereof. This count in the complaint was demurred to in the court below, on the ground that there was no allegation that defendant knew of plaintiff's youth and inexperience. The lower court overruled the demurrer, and upon appeal the Supreme Court held that the complaint was defective because of the failure to allege that the defendant had knowledge of the inexperience of the plaintiff.

In th case of Fulwider v. Trenton Gas, Light & Power Co., 116 S. W. 508, in passing upon a question of a failure to allege inexperience upon the part of the injured party, the court said:

> "Learned counsel make a showing of marked industry in citing authorities sustaining their abstract proposition of law; but the trouble in this regard is manifest as well as manifold. At the very door of their contention, they are met with the controlling proposition that they do not allege in their petition that their father was an inexperienced engineer. They do not allege there were hidden dangers connected with the stopping of defendant's engine off center, nor do they allege that their father's duty was to stop it off center. They make no allegation to the effect that there was a peculiar way to stop this engine off center and peculiar and unknown dangers incident to that way. So their petition is as dumb as an oyster on any issue relating to the duty to instruct their father, or a breach of that duty. To the contrary, they rested their case on their pleading on an entirely different theory, and they may not now, with insight sharpened by misfortune, mend their hold on appeal and convict the trial court of error on such amended hold. If plaintiffs desired to recover on the ground of inexperience or hidden danger, or the necessity of warning, or instructions and the negligent failure to darn and instruct, they should have raised those issues by appropriate averments in their petition. Potter v. Knox Co. Lumber Co., 146 Ind. 114, 44 N. E. 1000; 13 Ency. of Pl. and Pr., pp. 900-901."

In the case of La Porte Carriage Co. v. Sullender, 75 N. E. 277, the court said:

"The fact alone that appellee was 14 years of age will not raise or justify the inference that he did not know or appreciate the risks of his employment and was not qualified by experience to judge of the character and hazard of the work which he had undertaken to perform. In order to have properly charged appellant with a neglect of duty in not giving proper instructions or warnings, facts should have been alleged to establish appellee's ignorance and inexperience to judge for himself as to the character and perils of his employment, and that appellant with knowledge thereof, either actual or constructive failed to give him the necessary warning and instructions. These were essential elements which the pleading should have disclosed. Louisville etc. R. Co. v. Frawley, 110 Ind. 18, 9, N. E. 594; Brazil etc. Co. v. Young, 117 Ind. 520, 20 N. E. 423; and cases cited; Brazil etc. Co. v. Gaffney, 119 Ind. 455, 21 N. E. 1102, 4 L. R. A. 850, 12 Am. St. Rep. 422."

The principle herein involved was passed upon in the case of Knahtla v. Oregon Short Line & U. N. Ry. Co., 27 Pacific, 91, in which case the complaint alleged that the defendant was negligent, in that it allowed a certain bridge to become out of repair, and to remain in an unsafe condition. It was held that there could be no recovery, on the ground that the bridge was originally improperly constructed.

In its opinion the court said:

"The plaintiff cannot aver negligence in one particular, and on its trial prove that defendant was negligent in another particular. The object of a complaint is to apprise the court and opposite party

> of the facts relied upon for a recovery so plainly that the defendant may be prepared to meet them. This object of a pleading would be entirely defeated if a plaintiff had a right to aver in his declaration one ground of action, and on the trial prove another and different one. As was said by Earl, *J.*, in Southwick v. Bank of Memphis, 84 N. Y. 429: 'Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action, and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary.' ''

In the case of Gains & Co. v. Johnson, 105 S. W. 381, the complaint alleged that the plaintiff was injured by reason of the failure of defendant to provide a reasonably safe place to work, and reasonably safe machinery and appliances.

In passing upon the question of whether, under such an allegation, the plaintiff could recover for failure to warn and instruct, the court said:

> ''The duty of warning and instruction is entirely distinct from and independent of the duty of furnishing reasonably safe premises and appliances, as much so as the duty of furnishing reasonably safe premises is distinct from reasonably safe appliances. In other words, under an averment that the premises were unsafe, a recovery could not be had upon a showing that the appliances were unsafe, any more than a recovery could be had for the failure to warn and instruct upon evidence showing that the injury was caused by defective

premises. The petition in this case did not give to the defendant, now appellant, any notice that evidence would be introduced or a recovery sought upon the ground that it has failed to warn or instruct appellee. From the most casual examination of the petition it at once appears that in the pleading the plaintiff rested his case upon the failure to furnish reasonably safe premises and appliances. It furnished no notice that a recovery would be attempted because of the failure to warn or instruct. Appellee was asked, "Did anybody connected with the distilling company employing you explain to you the danger of oiling this machinery near that sprocket wheel before you oiled it?' Over objection of counsel for appellant he was permitted to answer, 'No, sir; there was none that ever warned me that there was any danger there at all.' In the condition of the pleadings, this evidence was not competent. It is not permissible to introduce evidence supporting a cause of action or defense that is not relied on in the pleadings. Kearney v. City of Covington, 1 Metc. 339. The parties have the right to look to and be governed by the pleadings in preparing their case, and are not required to anticipate that during the trial issues distinct from those relied on will be asserted. Nor should instruction No. 3 have been given. The instructions should conform to and follow the pleadings. An instruction is not authorized upon an issue not made or presented in the pleadings. The principle herein announced is fully supported by the analagous doctrine laid down in L. & N. R. Co. v. Dickey, 104 S. W. 329, 31 Ky. Law Rep. 894; Maysville & Big Sandy R. Co. v. Willis (decided Oct. 31, 1907), 104 S. W. 1016; C., N. O. & T. P. Ry. Co. v. Crabtree, 100 S. W. 318, 30 Ky. Law Rep. 1000."

CONCLUSION.

We contend that the defendant in error assumed the risk incident to unloading the logs from the car; that the plaintiff in error was not guilty of any negligence whatever in the premises and that the accident was due to the careless and negligent manner in which the defendant in error and Roy Rudd unloaded the logs; that the trial court erred in admitting testimony over the objection of plaintiff in error as to a failure to warn and as to the inexperience of defendant in error. For these reasons we ask that the judgment be reversed and a new trial granted.

Respectfully submitted,

EDWARD J. CANNON,
GEORGE M. FERRIS,
CHARLES E. SWAN,
Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

POTLATCH LUMBER COMPANY a Corporation,
Plaintiff in Error,
vs.
J. J. O'CONNELL, A MINOR, BY CATHERINE M. O'CONNELL, his Guardian ad Litem,
Defendant in Error.

No. 2281.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE BY DEFENDANT IN ERROR.

Counsel for plaintiff in error in their statement of the case omit to state fully the facts which surrounded the receiving of the injuries upon which this action is based, and to quote certain material parts of the testimony of defendant in error, part of whose testimony they quote.

In the first place, since inexperience is one of the grounds of the action, it is well to note that, to the best knowledge of the defendant in error,—and there is no contradicting testimony on the point—this was the third night that he was so employed in unloading logs, and that he was so engaged not over an hour and a half to two hours on each of the preceding nights (40-41-64), and that the defendant in error was a boy of the age of 17 years at the time of receiving the injuries complained of.

Next, the injuries were received at about 10:30 or 10:45 o'clock at night; that the night was dark and there was a very insufficient arc light some 150 or 200 feet away (41); that there were ice and snow on the car and it was very slippery under foot on the car in question (69); that there were three or four logs,—defendant in error was not certain which number—left on the car in a disorderly and promiscuous manner (67); and that the logs were sixteen or eighteen feet in length (68-69), two of them being about twelve inches in thickness and one about eighteen inches (66).

Further, to show material circumstances surrounding the incident, we quote the following from the testimony of the defendant in error (67):

On cross examination:

Q. In other words, you took a look at the logs and decided you would unload that one you have up there on the edge; is not that a fact?

A. I did not decide; I was told to.

Q. Who told you?

A. The foreman.

Q. And he did not tell you to unload that particular one first, did he?

A. Yes, sir.

Q. He pointed that one out to you?

A. He says, "Get them logs off of there and that one over on the other side will come off first."

We quote the following from the direct testimony of defendant in error (44-45):

Q. I now hand witness a flat board with six skids upon it for the purpose of further testifying at this time and illustrating the testimony. Now, I wish you would go on in your own way and illustrate what you mean. Just illustrate the whole matter anyway you want to.

A. (Illustrating). It has the same purchase on there as it has on the other place (indicating), and in the crane drawing this here, it leaves this here straight up; it throws the logs around in all shapes, and the night that I was hurt this cable being on the other end here, it would throw the logs—in other words, this being filled in with snow and this log, if I remember right, was about 16 or 18 feet, and it was held something like that there and caught there, and we tried it and it caught down there on us again, in here, and when it went off it caught the end of that log, and the weight of it being not sufficient to throw that log up and around off the car, this log striking me, I was standing in here, right inside of this bunk, knocking me in the pond on my head."

Again quoting from the defendant in error's direct testimony (48):

Q. * * * State whether or not at the time you rolled and was working on these logs the light was so that you could see exactly how they laid one with relation to the other.

A. *I could not.*

Q. I will ask you to state whether or not you knew prior to rolling the log off that it would strike the other log in any way.

MR. FERRIS.—If the Court pleases that is objectionable as calling for a conclusion of the witness.

The COURT.—He may state whether he saw the other logs there.

A. I saw the other logs there, but did not see—that is, did not see the condition they would fall in.

Further, on cross examination (73):

Q. What did you think would happen if this log in falling off struck the end of another log?

A. I did not think it could fall off; that is, I thought it would roll straight off,—would have been my opinion of it.

While the printed page cannot convey impressions that are as clear and distinct as the oral testimony given in the case, especially since a model was used to illustrate the position of the logs, the snow and the car, and the way in which the first log rolled off, and the manner in which the injuries were received, yet it is undisputed that the temperature on this night was five or six below zero; that the night was dark; that there was a steam rising from the pond making a fog (43); that the arc light was insufficient; that the foreman ordered this defendant in error and one Roy Rudd to remove this particular log first; that the logs were scattered in an irregular and disorderly way on the car; that the relative position of these three or four logs was not visible to the defendant in error; that the defendant in error and Rudd loosened the first log by means of their cant-hooks, or peavys (66-67), from the position in which it was caught; that they rolled it with some difficulty a short distance and that it became caught again and was held fast; that they loosened it again, and that as it

rolled off, it caught the end of another log which extended beyond the body of the flat car an unstated distance, throwing the latter log upward and around in such a way as to strike the defendant in error and to precipitate him into the pond (44-45-48).

SPECIFICATION OF ERROR BY PLAINTIFF IN ERROR.

The principal errors specified by plaintiff in error are (1) that the risks of the employment, even in a situation like that outlined above, were open and obvious, and that the defendant in error must be held as matter of law to have assumed them (pp. 8 and 11 of brief of plaintiff in error); and (2), that testimony relative to a failure to warn was received over the objection of counsel for plaintiff in error.

ARGUMENT AND AUTHORITIES. (SPECIFICATION OF ERRORS 3 AND 4).

Since opposing counsel discuss Errors 3 and 4 before considering Errors 1 and 2, we will do likewise.

Counsel for plaintiff in error argue that the danger at the time defendant in error received his injuries was most open, apparent and obvious. They compare the situation to a spring-board. But if this log had moved upward in the manner of an improperly constructed spring-board, there would have been no injuries sustained. It was the violent upward and sidewise movement of this log that caused the boy to be precipitated into the water. There are several reasons why the defendant in error could not tell beforehand

whether or not this log would swing upward and around and strike him.

Whether the log would tip up at all or not depended upon whether the weight of the first log, added to the weight of the unsupported end of the second, was greater than the weight of the portion of the second log remaining on the car, in inverse proportion to the length of the two ends; that is, if there were only two logs on a car, and one projected over the end of the car, the length of the unsupported end being, for example, in the ratio of one to four to the length of the supported end of the log, then the weight on the unsupported end, in order to tip the other end up in the least, would have to be in the ratio of four to one,—four pounds on the short end to one pound on the end remaining on the car. It is the principle of the lever. The edge of the flat car is the fulcrum. The portion of the log on the car is the long end of the lever; the portion of the log off the car is the short end of the lever. This seems quite simple, and it seems that it would not be very difficult to tell at least, whether the supported end of a log would tip up or not, if one is working in broad day-light, if there are only two logs on the car, and the unsupported end of one of them is extending a known distance beyond the edge of the car and at right angles to it, and the other log rolls straight off it with its entire weight on the first log; and there are no other circumstances than these. But is that this case? Was the relative position of the three or four logs remaining on the car known? It

was not. Was the end of the log which was on the car under another log or not? It was not known. If it had been, it undoubtedly would not have swung around at all. Was the light sufficient? It admittedly was not. Was it known how far the second log extended beyond the edge of the car? Was it known what resistance the snow and ice would have in the way of preventing the second log from swinging around sidewise? Would the entire weight of the first log be thrown upon, or rolled upon, the unsupported end of the second? The entire weight of the first log might tip the second up; part of the weight of the first log might not. Further, the momentum of the first log, as it was rolled, or was thrown, over the unsupported end of the second, was an element in determining whether the second would be moved from its original position or not. The momentum of a swiftly moving train might cause a bridge to fall; the same train moving slowly might pass over the bridge in safety.

There is an inconsistency between the Specifications of Error by counsel for plaintiff in error and their argument that shows the true state of the possibility of danger. In their Specifications of Error (III. p. 8 of brief), they complain that the Court erred in refusing to hold that the risks incident to the work, which included the risk at the time the injuries were received, were open and obvious, and that the defendant in error therefore assumed the same. And in part of their argument (p. 10), they urge that the position where defendant in error stood

was one of obvious and certain danger. But on Page 9 of their brief, they say that 'the latter log would undoubtedly swing around *in some direction* and *probably* hit him.' That is the point. There was a probability or possibility that the boy would be hit. He was not in the presence of obvious or certain danger. The log might swing around and hit him, and it might not. Counsel say, 'In some direction.' But, in what direction? It was not obvious or clear in what direction it would swing, if it swung at all. Counsel are mistaken when they state that 'undoubtedly' the log would swing around. The log might not be moved at all; it might be thrown upward, perpendicularly, after the fashion of an improperly constructed spring-board which counsel refer to; or it might be thrown upward and around in one direction or the other, depending upon the angle in which it was struck, or in which the other log rolled off it, the weight of the other log, and the various other circumstances mentioned in the paragraph above. There was a possible danger for the defendant in error to stand where he did; or, as counsel for plaintiff in error express it, there was a 'probability' that he would be hit. But that lacks much of being open, obvious and certain danger. An open and obvious risk or danger and a proboble danger are not the same thing by any means. With regard to this question as to whether the risk was an open and obvious one, and whether the defendant in error assumed it, the trial court well said (23), denying the motion for a new trial and for judgment notwithstanding the ver-

dict, that *"a jury of twelve men has found to the contrary, and I am not prepared to say that I am so far satisfied that their conclusion is erroneous as to justify me in directing a judgment for the defendant* (plaintiff in error here)."

There is another consideration that should not be lost sight of, namely, that, while there were two experienced men who saw this minor take the position on the car which he did, yet there is no intimation that either of them recognized that he was in even any possible danger.

Under all the circumstances of the case, the verdict of the jury could be rendered, not only in the honest and reasonable exercise of their judgment, which is all that is required, but that verdict was eminently correct.

Counsel for plaintiff in error quote many cases in an attempt to show that, as a matter of law, defendant in error should be held to have assumed the risk. These cases are distinguishable from the one at bar.

At page 12 of the opposing brief is cited Cudahy Packing Co. v. Marcan, 105 Fed. 645, which states the law with respect to minors as follows:

"A minor assumes the ordinary risks and dangers of his employment that he actually knows and appreciates, and those which are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care and prudence, know and appreciate them to the same extent as an adult."

But in the case at bar, the danger was not so open and apparent that the defendant in error appreciated it, or should have appreciated it, nor so

apparent that the two experienced adults associated with him appreciated it; the jury held that it was not so apparent that he should have appreciated it; and the trial court held that he was not convinced that the verdict of the jury was incorrect.

In the case cited, the slipping of the block was, no doubt, an ordinary risk which would have happened to an adult the same as to a minor.

The next case cited (p. 13), St. Louis Cordage Co. v. Miller, 126 Fed. 495, was, of course, correctly decided,—that a young woman should know that 'revolving cogs would crush her hand if she permitted it to slip between them.'

Hesse v. National Casket Co., 52 Atl. 384, cited at Page 15, was to the effect that a sixteen year-old boy should know as well as an adult that a bench would tip up if he got beyond its center of gravity. Bohn Mfg. Co. v. Erickson, 55 Fed. 945, cited at Page 16 of the brief, is to the effect that the danger was apparent to a boy, after entering upon his work at a relishing machine weeks before, and after repeatedly seeing the revolving knives at work that if he permitted his hand or his coat to come under those knives, they would cut his fingers, and tear and draw his clothes. Clearly, the decision is correct; an opposite opinion would be nonsense.

Likewise, the cases of Utah Consol. Mining Co. v. Bateman, 176 Fed. 57, Slady v. Marinette Lumber Co., 83 N. W. 514, and Helme v. Thilmany, 83 N. W. 360 (cited at pages 20, 21, of the brief), are cases

where the danger was open and obvious and there was nothing obscure or uncertain about it.

At page 25 of the brief is cited Bryan v. Armour, 47 N. E. 60, but in that case the Court said:

"There was no proof that the light was not sufficient to clearly distinguish the hook, or that plaintiff struck it from inability to see it."

All that case holds is that a master is not liable to a minor of the age of 19 years in case the minor strikes his hand against a sharp hook when there is no inability to see it.

Wagner v. Plano Mfg. Co. 85 N. W. 643, cited at page 28 of the brief was one where a binder turned over on a boy because it was not properly blocked up. The danger was as patent to a boy as to a man.

Likewise the other cases cited by counsel for plaintiff in error to prove that the defendant in error should be held to have assumed the risk. For example, how can Whalen v. Rosnosky, 81 N. E. 282, cited at page 30 of the brief, where a 17-year-old boy was injured by reason of a piece of steel flying off a hatchet he was using, and injuring his eye,—how does that case throw any light on the present one? Any hatchet is liable to break and there is as much danger of it so doing in the hands of a man as in the hands of a minor, and clearly the master cannot be held liable in such a case. Again, in Anderson v. Columbia Improvement Co. 41 Wash. 83, cited at page 33 of the brief, the danger was as open and obvious to a minor 20 years old, that a tree which he was cutting down might fall against another tree and break off a limb

thereby injuring him, as it would be to an adult. The last three cases cited on this point at pages 34, 35 and 36 were all cases where hands or fingers were caught between rollers or cogs. All of them were injuries received from dangers that were open, apparent, obvious, certain. The lack of analogy is clear.

The following authorities show, conclusively, that this was a case for the jury.

In Neilon v. Marinette etc. Paper Co., 75 Wis. 579, 44 N. W. 772, it was held that whether the danger in wiping the gearing of machinery while in motion was so apparent to a boy that *in following the foreman's instructions* he assumed the risks incident thereto, and whether he was properly cautioned as to such danger, was for the jury to decide.

The same ruling was made in Mary Lee Coal etc. Co. v. Chambliss, 97 Ala. 171; 11 So 897, where the question was as to whether a railway fireman 17 years old, who had been in the company's employ only two months and had never before undertaken to throw a switch, assumed the incidental risk of throwing a switch in the regular switchman's absence, in obedience to the order of the engineer by whom he was employed, and under whose orders he was.

In Zeigler v. Gotzian, 86 Minn. 290; 90 N. W. 387, a boy 16 1-2 years old was ordered to wash the outsides of windows in the third story of a factory where he had been employed for five months. *Held*, for the jury to decide whether he knew the place he was required to work was dangerous, and whether he understood the risks.

In Hinckley v. Horazdowski, 8 L. R. A. 490 (Ill.) a boy was employed to take lumber away from a flooring machine and load it on a wagon and was injured in attempting, under orders of the foreman of the mill, to oil machinery while in motion. Recovery sustained.

In McMillan Marble Co. v. Black, 14 S. W. 479, (Tenn.) a boy 15 1-2 years old was employed in a quarry and set to work close to a projecting rock, which, from some unexplained cause, fell and injured him. In affirming judgment for plaintiff the court said:

"He was not at fault for accepting work, under direction of his superior, so near this dangerous rock; for the projection was so patent to all that he had a right to assume that the foreman had tested it, and found it safe, and that the superintendent would not otherwise send him to such a place. To our minds, these facts abundantly sustain the verdict. The failure to test and remove this impending rock, and the placing of this young boy in such close proximity to it, are facts from which an intelligent jury may well have imputed negligence to the marble company; indeed we do not see how they could reasonably have reached any other conclusion."

In Felton v. Girardy, 104 Fed. 127, an inexperienced boiler maker's helper was ordered by the foreman of railroad shops to go into the fire box of a locomotive and tighten the plug in a leaking flue of the boiler. The Court in affirming judgment for plaintiff, speaking through Justice Lurton, said:

"In determining the question of obviousness, every reasonable inference must be drawn in favor of the party against whom a peremptory instruction is asked. In view of this principle, we are not prepared to say that the dangers incident to the work which Beckert was called upon to do, and the proper mode of en-

countering them, were sufficiently obvious to justify the Court in taking the case from the jury. If he had never repaired such a leak, or worked in a situation so confining and uncomfortable as the hot fire box of an engine whose boiler was full of steam; if he, from inexperience, supposed such boiler flues to be always plugged with the driven plug, or, in the heat and discomfort of his place for working, mistook, from inexperience, a screw plug for a driven plug,—we are not prepared to say that the master is relieved from responsibility, even though very slight knowledge of this particular kind of repairing might have enabled this servant to have done this work in safety, using due care."

In Western Union Telegraph Co. v. Burgess, 108 Fed. 26, plaintiff was employed as a lineman by defendant company and was directed by the foreman to climb a pole and saw it off some 40 feet above the ground. In doing the work he held to the pole with one hand above the place where he was sawing, and when the pole was partly sawed through it broke off, causing plaintiff to fall, and be injured. The Court held in that case as follows:

"It will appear from the statement of the case that there was some evidence tending to show that the defendant in error was an inexperienced servant, and was changed from the work to which he had become accustomed, and set at work which involved greater danger, without any warning or instruction as to the safest mode of doing the new work. Under such circumstances, and in this state of the case, we think the question of contributory negligence was a question of fact for the jury to determine."

In the case of Sink et. al. v. the Sikes Co., 134 Fed. 144, the frame of a saw had been jarred loose

from the floor and instead of holding it down it was tied with a rope. Employes of mature age and experience discovered this defective condition and reported it to the foreman. But the foreman ordered the plaintiff, a minor and inexperienced in this sort of work, to proceed with his work near this defective machinery. The immature servant was not aware of any unusual danger and it was held that he did not assume the risk thereof and that the question of negligence was for the jury.

The case of The Buffalo, 147 Fed. 304 is quite similar to the present one. The libelant was a longshoreman 22 years old and was employed to work on the wharves in loading and unloading ore boats. He was wholly inexperienced in work of this character. The night was dark. He was not at the time of his employment, nor subsequently, warned of any dangers of his occupation. He was sent with others to transfer ore from a scow to a steamer, using for the transfer a traveling crane upon the scow. As libelant stood up after filling a bucket on the scow he was struck by the crane from behind and thrown against the side of the scow, and throwing his arm over the gunwale to regain his feet it was crushed by one of the wheels of the derrick. The Court said:

"The place was manifestly a dangerous one in which to work as the nature of the accident and its occurrence would impliedly indicate. Mather v. Rillston, 156 U. W. 391, 15 Sup. Ct. 464, 39 L. Ed. 464. To an inexperienced workman the dangers of the employment, as a matter of law, cannot be held to have been obvious."

In Alaska United Gold Mining Co. v. Keating 116 Fed. 561, it was contended that the plaintiff was guilty of contributory negligence by standing upon the bail of a bucket when going down the shaft of a mine, instead of standing in the bucket. He struck an obstruction projecting in the shaft and was thrown from the bail of the bucket and injured. The Court in affirming judgment for plaintiff said:

"With respect to the defense urged that the plaintiff was guilty of contributory negligence, it is necessary to understand what constitutes contributory negligence in a case of this character. It is the want of ordinary care and prudence on the part of the person injured by the actionable negligence of another combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. 7 Am. & Eng. Enc. Law (2d Ed.), p. 371. Assuming that the presence of an obstruction in the shaft ought to have been ascertained by the defendant before the skip on which plaintiff was riding was sent down, and that this omission was the negligence of the defendant, then it is clear that the plaintiff's position on the skip, although it may have been dangerous, was not a proximate cause of the injury, as it did not combine or concur with the defendant's negligence in causing the injury."

Finally on the question as to whether or not the Court erred in refusing to hold that the defendant in error assumed this risk as a matter of law, and in refusing to hold that he was guilty of contributory negligence as matter of law we quote the following from Texas & Pacific Railroad Co. v. Gentry, 163 U. S. 353 (By Justice Harlan):

" 'When a given state of facts is such that reasonable men may fairly differ upon the question as

to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.' Grand Trunk R. Co. v. Ives, 144 U. S. 408, 417."

(SPECIFICATIONS OF ERRORS 1 AND 2).

Plaintiff in error complains that there was no allegation that it had any knowledge of the inexperience of the defendant in error and that there was no allegation that the plaintiff in error failed to warn defendant in error of any danger connected with the work. But the trial Court well said on this point:

"However, the foreman in charge of the work was a witness at the trial and at no stage of the case was there any intimation that a warning had been in fact given. Indeed, the third affirmative defense 'that the plaintiff at the time he entered upon the work in which he was engaged, understood and fully appreciated any and all dangers connected therewith and full appreciated the fact that the logs would roll and might injure him if he got in their path, and that in entering upon the work he assumed and took upon himself all dangers and risks incident to his employment, among which were the dangers and risks which he alleges caused the accident'—would seem inconsistent with the theory that a warning was given.

And not only is the pleading inconsistent with the theory that a warning was given, but the testimony of the foreman himself is wholly inconsistent with any such theory. (108):

"MR. ROBERTSON.—Q. Why didn't you instruct him as to his duties?

"A. Why, I probably did not think of it at the time, or something like that. *I don't know just why I did not tell him.* Probably I did tell him; I don't recollect. He said this morning that I showed him how to put the cable on the car. I don't recollect whether I did or not (129-97); probably I did. I have put men to work there and showed them how.

Q. Told them how to get the logs off and how to watch that they did not get hit when they were rolling off?

"A. Well, I told some of them; I don't recollect whether I told him or not."

Well might the Court add with regard to the ruling admitting testimony on the failure to warn, *"Under all the circumstances, therefore, I am not prepared to say that the defendant was prejudiced by the ruling complained of."*

With regard to the knowledge of the inexperience of the defendant in error or the lack of such knowledge, it is only necessary to point out that Assignments of Error 1 and 2 (115) make no mention of such alleged error as one on which plaintiff in error will rely in this Court; and to call the Court's attention to the fact that at no place in the record is there any intimation that there was such lack of knowledge. It is difficult to see how prejudicial error can be asserted or found in this respect.

As was said in Press Pub. Co. v. Monteith, 180 Fed. 356:

"Prejudice must be perceived, not presumed or imagined. * * *

"The granting of a new trial is often a denial of justice, witnesses die or remove beyond the jurisdic-

tion of the Court and the resources of the litigants become exhausted.

"Believing as we do that the libel here was without justification or excuse and that the verdict was not excessive, we should hesitate long before requiring the plaintiff to begin anew the weary pilgrimage through the Courts."

Board of Com'rs of Lake County v. Keene Five-Cents Sav. Bank, 108 Fed. 505, is as follows (Syllabus):

"Alleged errors which the record conclusively shows could not have affected the decision and judgment work no prejudice and constitute no ground of reversal."

Lancaster v. Collins, 115 U. S. 222, holds as follows (Opinion by Justice Blatchford):

"No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made. Deery v. Cray, 5 Wall. 795, 803; Gregg v. Moss, 14 Wall. 564, 569; Lucas v. Brooks, 18 Wall. 436, 454; Allis v. Insurance Co., 97 U. S. 144, 145; Cannon v. Pratt, 99 U. S. 619, 623; Mining Co. v. Taylor, 100 U. S. 37, 42; Hornbuckle v. Stafford, 111 U. S. 389, 394; S. C. 4 Sup. Ct. Rep. 515."

The case of Bryson vs. Gallo, 180 Fed. 70, contains the true and correct doctrine for testing the sufficiency of the pleadings in the present case.

The Court holds in that case that:

"Under the federal conformity statute (Rev. St. Par. 914) (U. S. Comp. 1901, p. 684), which provides that the pleadings in actions at law in the federal courts shall conform as near as may be to those in the state courts, the federal courts may look

to the state statutes upon the question of the construction of pleadings in such actions."

The opinion goes further than this, even the state decisions upon questions of the sufficiency of the pleadings, or the fact of a material variance, seem to be controlling (Page 75).

To quote from the opinion:

"It is not meant to say either that the language quoted or that the language of the petition as a whole is as clear as it should have been respecting averment of violation of the primary duty of the master. * * * We may, therefore, upon such a question as this look to the Civil Code of Ohio to ascertain how such a pleading should be construed."

Then follows a section of that code which is similar to Sec. 295 Rem. & Bal. Codes of the State of Washington, namely:

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

The Court continues in this language:

"Construing the language of the petition liberally 'with a view to substantial justice between the parties,' we are not persuaded that the trial court committed error of a prejudicial character in admitting the evidence in question."

Further, the Court in that case quotes a section from the Ohio code, which is the same as Section 299, Rem. & Bal. Code, and it is decisive upon the question of variance in this case. That section in our code reads:

"No variance between the allegation in a pleading and the proof, shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled that fact shall be proven to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just."

The plaintiff in error has not proven, so far as the record shows, to the satisfaction of this Court, that he has been misled by the allegation in the complaint, nor has he shown in what respect he has been misled. A full defense was made by it and the substantial rights of the parties determined by the judgment in this case.

We say in this case, as the Court said in the Bryson case, that:

"It follows that, whether amendment was necessary or not, at most there was not under the facts pointed out a material variance."

The Federal Court then cites several Ohio cases on the question of what in that state is a material variance. The Washington statutes and decisions are determinative of what is a material variance in this case.

The following Washington cases show, beyond a question, the sufficiency of the pleading.

Collett vs. N. P., 23 Wash. 600, reads as follows:

"It is true that plaintiff did not plead want of light as a circumstance comprising negligence, but, under the well established rules this was not necessary be-

cause to compel him to do so would be, in the language of many of the cases, to compel him to plead his evidence.

"The rule is well-nigh universal that in an action for negligence the plaintiff need not set out in detail the specific acts constituting the negligence complained of, as this would be pleading the evidence. 14 Enc. Pl. & Pr. p. 333 and cases cited."

In this case the Court quotes with approval the case of Oldfield vs. N. Y. & H. R. R. Co., 14 N. Y. 310, where the complaint contained but a general averment of negligence on the part of the defendant and evidence was admitted to show that there were no guards in front of the cars to prove negligence; the New York Court saying:

"The complaint avers that the death was caused by the negligence of the defendants and their agents and servants. This authorizes evidence on the defendant's negligence or misconduct tending to produce the injury, without a more particular statement in the pleading."

Crooker vs. Pacific Lounge & Mattress Co., 24 Wash. p. 191, states:

"It is not necessary to set out the negligent acts in detail, but a general averment that the defendant was negligent in doing or not doing the particular act complained of is sufficient."

Albin vs. Seattle Electric Co., 40 Wash. 51, states:

"Where the only allegations in a pleading are general in their character, are not aided by averments of specific facts, but yet are sufficient as against a general demurrer, and the opposite party has not availed himself of his right to have said general allegations made more definite and certain on motion, we think a wide latitude should be allowed by trial courts

in admitting evidence. The object of all pleadings is to advise the court and the opposite party of the grounds upon which the pleader bases his right of action or defense."

The Court in this case and the opposite party were advised, and the issue was made, as to the understanding of the hazards which this minor would undergo.

Furthermore, we contend, as the Court held in the case of Bryson vs. Gallo, cited above, that Section 307, Rem. & Bal. Codes is applicable in testing the sufficiency of this pleading just as a similar section of the Ohio Code was held applicable when reversal of the judgment was sought in the Bryson case.

This section reads (Par. 307):

"The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

The Court in the Bryson case, 180 Fed. 75, in applying this section, said:

"We therefore conclude that we should consider this case as though admittedly an issue had been distinctly formulated by the pleadings alleging and denying failure of the master to supply the necessary guide lines. * * *"

The Washington Supreme Court in the case of Green vs. Tidball, 26 Wash. 338, in passing upon this section, said:

"The statute directs us to disregard any error

or defect which does not affect a substantial right of the adverse party (Bal., par. 4957, Rem. & Bal. 307), and to determine all cases upon the merits thereof, disregarding all technicalities, and to consider all amendments which could have been made as made (Bal., par. 6535, *Rem. & Bal., 1752*). When, therefore, a cause has been tried upon its merits, as if upon pleadings sufficient in form and substance, in which the complaining party has not been misled, and has had full opportunity to present his case, some substantial wrong, some failure on the part of his adversary to aver or prove a material matter necessary on his part to be averred and proven in order to entitle him to recover, must be shown, before this court is warranted in reversing and remanding a cause for a new trial. *A mere defect in pleading is not such a cause.* It must not only be defective, put must have operated to the substantial injury of the complainant, before that result can follow:

Irby vs. Phillips, 40 Wash. 618, states:

"The respondents were entitled to amend the complaint to correspond with the proof, and in such case this court will, on appeal, consider such amendment as made."

Decisions of a state Court of last resort construing a state statute will be followed by United States Courts.

Tullis vs. Lake Erie, Etc. R. Co., 175 U. S. 348, 44 L. Ed. 192;

Missouri K. & T. Ry. Co. v. McCann, 174 U. S. 580; 43 L. Ed. 1093;

American Sugar. Ref. Co. v. City of New Orleans, 119 Fed. 691;

Guarantee Trust. Co. of New York vs. Galveston City Ry. Co., 107 Fed. 311;

Runnel v. Butler Co., 93 Fed. 304;

Yarrington vs. Del. & Hudson Ry. Co., 143 Fed. 565.

The purport of these statutes and Washington decisions, which are controlling in this case, is that no judgment shall be set aside unless there is a defect in the pleadings, *and* the adverse party has been misled and prejudiced thereby, *and* that amendments which should have been made will be considered as made.

The conclusion, therefore, is inescapable that in this case, even if there was a defect in the pleadings (which we do not admit, but on the other hand contend that the allegations were sufficient, the adverse party having notice in the pleadings that the case would be tried on the issues of the minority, inexperience and the understanding or information of the plaintiff as to the hazards to be encountered and the negligence and carelessness of the defendant)—even if there was a defect, the plaintiff in error has not proven that it was misled. The case was tried with a full understanding on its part of the issues involved, the plaintiff in error has not proven prejudicial injury, amendments which could have been made should be considered as made, and the judgment should therefore be affirmed.

Respectfully submitted,

ROBERTSON & MILLER,
Attorneys for Defendant in Error.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

POTLATCH LUMBER COMPANY, a Corporation,
Plaintiff in Error,

vs.

J. J. O'CONNELL, a Minor, by Catherine M. O'Connell, his Guardian ad litem,
Defendant in Error.

No. 2281

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Comes now the above named plaintiff in error and respectfully petitions the court for a rehearing of this cause.

It is evident from the opinion filed herein that the court has failed to take into consideration all of the facts shown in the record, and that with reference to some of the facts the court has misunderstood the testimony. It is stated in the opinion that two men were present at the time of the accident, and that they

did not see any danger of defendant in error being injured.

The record in the case does not support this statement. The testimony shows that the only persons present at the time of the accident was the plaintiff and his fellow servant, Roy Rudd, both of whom were engaged in rolling off the log in question. The testimony of the foreman, Joe Loehr (Record p. 98), is as follows:

> "Q. Where were you at the time of the accident?
> A. I was at what we call the pump house,—where we eat our lunch nights. I was in there when Rudd came and told me the man was hurt.
> Q. When who told you?
> A. Rudd."

When the foreman gave the plaintiff and his fellow servant directions to roll these three logs off the flat car, he had a right to assume they would do it in a manner which would not be dangerous for them. The plaintiff's testimony shows that neither he nor his fellow servant took any precautions whatever to ascertain how the logs in question were lying upon the car, or the effect upon the log which struck plaintiff, if it should be struck by the log which they were rolling off the car. Plaintiff's injury was the result of his own carelessness and negligence.

The court further states in the opinion filed herein that the negligence of the defendant with reference to the insufficiency of the light furnished was a question for the jury. The error in this statement lies in the fact that the jury never had an opportunity to pass upon that question. The trial court instructed the jury in

this case that the mere fact that the light in the place where the work was being performed was insufficient, was not negligence on the part of the defendant, for which plaintiff could recover. Therefore, any alleged negligence on the part of the defendant with reference to the light of the working place of plaintiff was elimnated from the case.

This court cannot now sustain the verdict and judgment in this case upon the alleged negligence of the defendant with reference to the lights which were furnished, when that ground of negligence was not submitted to the jury, and therefore did not enter into the verdict in any way. Aside from this fact it has been held in a number of cases that whether or not the light furnished was sufficient, is an open and obvious fact which the servant assumes by remaining in the employment, with knowledge of the conditions under which he is working.

In Donovan vs. American L. Co., 61 N. E., 808, this question is passed upon squarely by the Supreme Court of Massachusetts, and it is there held that such a risk is assumed by the servant as a matter of law. See also

Thompson vs. Paper Co., 48 N. E., 767.
Kanz vs. Page, 46 N. E., 629.
Whittaker vs. Bent, 46 N. E., 121.

The rule of law to the effect that the servant assumes the risk of all dangers that are open and obvious, leaves no room for the contention that when the servant has worked for a number of nights under the conditions which surrounded the plaintiff in this action, it is for

the jury to say whether or not the master was negligent, for if it be conceded that there was any negligence on the part of the defendant with reference to the lighting of the place, then the condition was open and obvious and certainly understood and appreciated by the plaintiff. He therefore cannot be heard to say that he did not assume this risk. Any other rule would make the master an insurer.

In the opinion of the trial court filed in the court below, with reference to the lighting of the place, the court said (22):

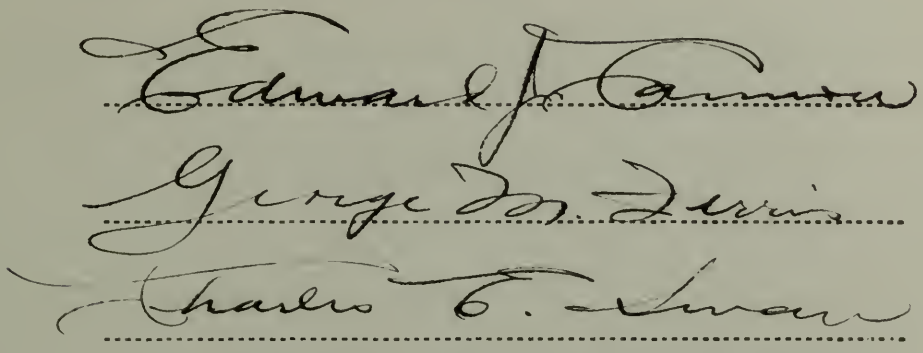
> "If it be urged at this time that the manner of lighting was an independent ground of negligence, I presume it will be conceded that the absence of light, at least was open and apparent, even to an inexperienced youth of seventeen years.

The trial court having instructed the jury that the defendant could not be held liable because of the condition of the lights under which plaintiff was working, and the plaintiff having taken no exceptions to this instruction, it became the law of the case.

We therefore respectfully request that the court grant a rehearing in this case for the reasons hereinbefore set forth.

EDWARD J. CANNON,
GEORGE M. FERRIS,
CHARLES E. SWAN,
Attorneys for Plaintiff in Error.

The undersigned attorneys for defendant in error hereby certify that in their opinion and judgment the foregoing petition for re-hearing is well founded and that it is not interposed for delay.



Attorneys for Defendant in Error.